

ONTARIO HUMAN RIGHTS CODE
R.S.O. 1990, c. H. 19

BOARDS OF INQUIRY

BETWEEN:

LUIS ESPINOZA

Complainant

and

ONTARIO HUMAN RIGHTS COMMISSION

Commission

and

COLDMATIC REFRIGERATION OF CANADA INC.,
GEORGE ZAFIR, and BRIAN PALMER

Respondents

DECISION

Board of Inquiry:

R. Hartman, Chair

Appearances:

C. Rubio,
Complainant's representative

S. Ffolkes-Abrahams,
Counsel for the Commission

J. Siegel
Counsel for the Respondents

Dates and Place of
Hearing:

January 26, June 6-10, July 18, 20, 21, November
7, 8, 9, 21, December 6, 7, 8, 9, 21, 30, 1994, and
January 3, 1995

Toronto, Ontario



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PROCEEDINGS

By letter dated December 29, 1993, I was appointed by the Minister of Citizenship to chair a Board of Inquiry into the complaint of Luis Espinoza, dated November 6, 1989, against Coldmatic Refrigeration of Canada Ltd. ("Coldmatic"), George Zafir and Brian Palmer.

The hearing was commenced by conference call on January 26, 1994, and I heard evidence over 17 1/2 days - June 6, 7, 8, 9, 10, July 18, 20, 21, November 7, 8, 9, 21, December 6, 7, 8, and 9, 1994 - and argument on December 21, 30, 1994 and January 3, 1995.

The complainant was represented by C. Rubio, community legal worker with Centre for Spanish-speaking Peoples. The Ontario Human Rights Commission ("OHRC") was represented by S. Ffolkes-Abrahams, counsel, assisted by S. McDonald, student-at-law. All three respondents were represented by J. Siegel, counsel. Ms. Rubio and Mr. Siegel were present on all hearing dates; Ms. Abrahams, at all but December 21, 1994 and January 3, 1995; and Ms. McDonald, on November 7, 8, 9, 21, December 6, 7, 9, 21, and January 3, 1995. Mr. Espinoza was present for all or part of the oral hearings on June 6, 7, July 18, and November 9, 1994; Mr. Zafir and Mr. Palmer, for all except December 21, 30, 1994 and January 3, 1995.

The Board heard testimony under oath from 21 witnesses, several of whom were assisted by N. Sandoval or A. Zisman, interpreters in the Spanish language. In addition, 19 filed exhibits were filed along with books of relevant case law as submitted by the parties. Several witnesses requested and were granted the protection of the *Canada Evidence Act* and *Ontario Evidence Act* regarding their testimony.

ISSUE

Luis Espinoza was employed at Coldmatic between June 1987 and March 1989 and claims that he was effectively discriminated against in that workplace by the Respondents on the basis of his race, colour, ancestry, ethnic origin and place of origin, and harassed and fired, in contravention of sections 5(1) (2) and 9 (formerly ss. 4(1) (2) and 8) of the *Human Rights Code*, R.S.O. 1990, c.H.19. The following particulars are set out in his complaint filed on November 6, 1989:

2. During the time that I worked for this company I observed the employer discriminating and abusing Spanish speaking people, particularly those persons who are members of visible minority groups. For example, Spanish speaking people often had their pay cheques thrown in their faces by Brian. On one occasion July 1987, he threw out the belongings and clothing that Spanish speaking workers kept in their lockers. As a result of this action, I lost about \$60.00.

3. Because of this incident, myself and about nine other employees left the company. We returned at George's insistence after he promised that the conditions would change and we would see improvements in our salaries. In December 1988, I was supposed to get a raise in pay. I never received it.

4. Brian, the supervisor insults and abuses Spanish speaking workers routinely. It is my information that he is always complaining and making negative remarks about the Latin workers.

5. On March 3, 1989 my supervisor Carlos told me to turn the heaters on so that foam could be put on them later on. I was working with another employee at the time. Another employee, John came to our work area and wanted to put the foam on the heaters right away. My partner told him to wait because the heaters were not yet hot enough. John got upset and poked my partner in the neck at the same time shouting "Fucking Latins, you don't know anything."

6. Another Spanish speaking co-worker intervened and told John not to insult Latins. An argument started and they were about to hit each other. At that point, I tried to separate them and to prevent a fight. John hit me on the nose which started to bleed.

7. I went to see Brian, who without even asking me what had happened, told me that I was fired. ...

LAW

1. Code provisions

Section 5 of the Ontario *Human Rights Code* provides as follows:

5. (1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or handicap.

[Emphasis added]

By section 10(1), "harassment" is defined to mean "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome".

By section 9, "no person shall infringe or do, directly or indirectly, anything that infringes a right" under section 5. In the case of section 5(1), by section 45:

any act or thing done or omitted to be done in the course of his or her employment by an officer, official, employee or agent of a corporation...shall be deemed to be an act or thing done or omitted to be done by the corporation....

2. Interpretive Case Law

(a) Right to Equal Treatment

The following cases are helpful in understanding the "right to equal treatment without discrimination" provisions in s. 5(1).

The Supreme Court of Canada, in Mr. Justice McIntyre's reasons in Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, gave the following definition of discrimination:

Discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations or disadvantages not imposed on others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

It is not necessary to have intended to discriminate, nor is it necessary for there to be a differentiation between groups. As stated by the Board of Inquiry in Ahluwalia v. Metropolitan Toronto (Municipality) of Commissioners of Police (1983), 4 C.H.R.R. D/1757:

If one argues that the meaning of discriminateis restricted to the sense of being treated differently, such conduct, no matter how offensive to reasonable sensibilities, would not be unlawful so long as the offensive conduct was maintained consistently throughout the workplace.

Judith Keene in her book, *Human Rights in Ontario*, 2d ed., p. 8, commented on the need for Boards of Inquiry to look at "historical patterns of oppression" to understand what she termed "job ghettos":

....and in the appropriate situation to explore the idea of the "notional other", that is, the likelihood that if persons other than those of the complainant's race, sex etc. had been present in the disputed situation, such others would be accorded more dignity than was the complainant.

In O'Malley v. Simpson-Sears Ltd. (1986), 7 C.H.R.R. D/3102, it was stated by Mr. Justice McIntyre of the Supreme Court of Canada:

It will be seen at once that the problem confronting the Court involves consideration of unintentional discrimination on the part of the employer and as well the concept of adverse effect discrimination....[The] broad policy of the Code...aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or

restrictive conditions not imposed on other members of the community, it is discriminatory

[Emphasis added]

Some human rights cases in Ontario have dealt with situations, such as above described, under the rubric of “adverse effect” or poisoned work environment. Where actions, comments or behaviour related to a protected ground permeate, and thus poison, a work environment to the point that they are an implied condition or term of employment, Boards have found an infringement of the right to equal treatment under s. 5(1).

The concept of a poisoned work environment under s. 5(1) has been applied by Ontario Boards of Inquiry to find sex discrimination in Shaw v. Levac Supply Ltd. Et al (1991), 14 C.H.R.R. D/36 (Ont. Bd. Of Inq.), and Hom v. Impact Interiors Inc. (unreported Ontario Board of Inquiry decision dated November 16, 1993, #569); discrimination on the basis of race in Ahluwalia v. Metropolitan Toronto Board of Commissioners, supra and Dhillon v. F. W. Woolworth Company Limited (1982), 3 C.H.R.R. D/743; and “because of...handicap” in Ghosh v. Domglas Inc. et al. (1992), 17 C.H.R.R.D/216.

(b) Freedom from harassment

The term poisoned work environment occurs in the case law involving s. 5(1) and 5(2) and it is sometimes difficult to distinguish between discussions concerning harassment and discrimination, as they overlap just as the conditions sought to be addressed often overlap. This can be seen in this comment by Ms. Keene in *Human Rights in Ontario*, at p. 223:

The rationale in bringing harassment under the former *Code* was that racial slurs, name-calling and other offensive behaviour created a hostile working environment constituted a term or condition of employment, inflicted on the target employee(s), that was different from other employees’ terms and conditions of employment, and hence discriminatory.

An infringement of s. 5(1) attracts automatic liability for corporate employers under s. 45(1), but s. 5(2) is expressly excluded from the section. Harassment because of sex is also excluded from s. 45(1). This distinction in remedy was questioned in a recent unreported Board of Inquiry decision, Henwood v. Gerry Van Wart Sales Inc. (February 9, 1995 No. 68111), where harassment because of sex was established:

...it has been argued that harassment is somehow qualitatively different from discrimination, with the result that individual harassing conduct of employees or supervisors within the workplace should not be regarded as action within the scope of employment. It follows from this approach that an employer is rightly held responsible for discriminatory actions falling within s. 5 of the Code, but not harassment contrary to s. 7 and s. 10(1). Again this argument is contradicted by two decisions of the Supreme Court, *Janzen, supra*, which held that harassment does not fall outside the prohibition of discrimination, but is rather one pernicious species of discrimination; and *Robichaud*, in which the Supreme Court specifically found the Department of National Defence liable for sexual harassment by its personnel.

It follows that I respectfully disagree with Professor Hubbard, who concluded in *Shaw v. Levac Supply Limited (1991)*, 14 C.H.R.R. D/36 and *Ghosh, supra*, that in Ontario, sexual or other harassment falls outside the *Robichaud* liability principle [the duty of the employer to remedy an unhealthy work environment].

Putting aside the issue of remedy, the case law dealing with harassment because of sex under s. 7(2) is helpful in understanding harassment on the grounds set out in s. 5(2). The causal connection between the conduct and the protected ground (sex, race, ethnic origin, etc.) is not always clear and Boards have acknowledged that harassment can exist even where the comments are oblique and ambiguous. The same could be said of workplace harassment on grounds other than sex.

Under the *Code's* definition of harassment, there must be "a course of vexatious comment or conduct". While the use of "vexatious" implies a subjective component, Boards have held that there must be more than an isolated incident

and it must be established that the respondent "knew or reasonably ought to have known" the behaviour was unwelcome, thus bringing objective elements to the definition.

Again, as with discrimination, the motivation of the person who is harassing another, either directly or indirectly, is not the issue. As discussed by the Board of Inquiry in Persaud v. Consumers Distributing (1991), 14 C.H.R.R. D/23:

[The respondent] is a short-tempered, aggressive bully who will retaliate verbally, and even physically, against anyone, whether white or non-white who challenges him. ...His motivation...was not one of racism; rather the fights would be triggered by specific issues arising that were work-related. But his expressions in such fights would include derogatory racial epithets and name-calling as one means of belittling and humiliating the opposition when the opponent was a member of a visible minority...

I will now address the evidence heard with respect to the workplace at Coldmatic to determine whether or not a finding can be made under section 5(1) or (2) in the complaint brought before me by Mr. Espinoza.

EVIDENCE

I. Introduction

These proceedings were protracted and highly contentious. The respondents alleged abuse of their rights by the OHRC investigator, based on certain inflammatory statements attributed to the investigator by Mr. Alex Santoro, another worker at Coldmatic. Mr. Zafir advised that, half-way through the hearing, he learned that the alleged statements had not been made, and that Mr. Santoro had made them up. The Board never heard from Mr. Santoro.

The proceedings also created some anxiety for a number of those called upon by the parties to testify about their experience at Coldmatic. To some extent, this can be expected, given the power imbalance as between employer and employee but in this case the disparities were heightened because of extraneous matters such as immigration status, and literally pitted brother against brother.

2. Similar Fact Evidence

Early in the hearing process, a ruling was requested by the respondents to exclude similar fact evidence regarding events after 1990, on the basis that after this date the workplace atmosphere was detrimentally affected by the OHRC investigation of the complaint.

Counsel for the OHRC argued that any similar fact evidence called would address the two issues raised in the complaint: a) to establish that a poisoned work environment led to unequal treatment, under s. 5(1), which would bring automatic corporate liability under s. 45(1); and b) to establish a course of conduct under the definition of harassment, under s. 5(2), which, if successful as against Mr. Palmer and Mr. Zafir, would require the Commission to establish knowledge on the part of Coldmatic, the corporate respondent.

Prior case law clearly provided precedent for the admission of similar fact evidence in Board proceedings. [See, for example, *Commodore* (1983), 4 C.H.R.R. D/1399, *Graesser* (1983), 4 C.H.R.R. D/1569, *Hall* (1989), 10 C.H.R.R. D/6126] Nothing in that case law prohibited the admission of evidence subsequent to the time of the complaint, provided it had sufficient probative value to outweigh the obvious prejudicial factor.

I was prepared to hear evidence from similar fact witnesses with respect to the claim of a poisoned work environment which addressed the allegations raised in the complaint - derogatory language and abuse based on race, colour, ancestry,

ethnic origin and place of origin. Clearly, if intervening factors were established, thus creating a different environment than that in place at the time of the complaint before this Board, the probative value of such testimony could be addressed in submissions.

Similar fact witnesses were called by the complainant, OHRC and respondents.

3. The Players

Prior to reviewing the evidence regarding the working environment at Coldmatic, some understanding of the workplace - its history, and its inhabitants - is beneficial.

(a) Coldmatic and Mr. Zafir, corporate and personal respondents

Coldmatic is one of a number of companies owned by George Zafir, through a holding company in his name.

Mr. Zafir, now 56, came to Canada at age 19 after the political unrest in Hungary in 1956. He told the Board of his traumatic childhood in Hungary during World War II. In 1943, his father was arrested and later died in Russia. In 1944, he was taken at age 6, with his mother and sister, by the occupying army. He said that they were destined for Auschwitz but at the last minute were rerouted to a small Austrian town in Austria where they were kept in a detention area. Mr. Zafir said he learned as a child, through a series of horrid and dehumanizing events, that people were the same regardless of nationalities and that the line between life and death was slight. After the war, he returned with his mother and sister to Hungary where he lived under the communist regime, until emigrating at 19 to Canada, with his mother and step-father.

In Canada, Mr. Zafir had a number of short-lived jobs in Montreal and Toronto. Describing himself as "very mechanically inclined" and "good at the business of making money", he soon, by accident and design, was in business for himself, starting out in repairs and branching out into manufacturing. He attributed his current success to hard work and energy, and keeping his market edge by underpricing and cutting costs. He described his early years in business as a family affair, with his wife, Judy, taking care of the payroll and administrative matters, and a handful of employees willing to work without lunch or break as needed to get the work done.

Coldmatic was purchased by Mr. Zafir as a shell in 1968, from a business friend. It had been a small operation with a good reputation, providing refrigeration parts and assembly production, which had been run down for tax purposes by the vendor. Mr. Zafir essentially bought the name and logos and applied it to his company, Canadian Refrigeration, a small repair and manufacturing facility which he had begun on Baldwin Street, in the City of Toronto, and later moved to 4500 Chesswood Drive ("Chesswood"). Canadian Refrigeration now became the shell, with Coldmatic the operating concern in the business of manufacturing reach-in/walk-in commercial coolers.

In 1983, Mr. Zafir purchased UCN, a display-case manufacturer which had gone bankrupt in St. Catharines. In 1985 he moved the UCN production equipment to 8500 Keele Street ("Keele") in Toronto, a 10 acre site of a former lumber yard and retail store. At Chesswood, the company had expanded and was running out of space. In 1986, a new factory was constructed at Keele and Coldmatic was moved there in the spring of 1987.

Coldmatic is the largest of the companies currently held by Mr. Zafir's holding company, with current annual sales of approximately \$30,000,000, and an employee payroll of over \$5,000,000. Mr. Zafir said that Coldmatic presently is one of the top ten in the world in terms of its production capabilities, with world-

wide markets and distribution, an accomplishment he attributed to consistently selling products at prices 10-15% under the competition.

Prior to the move to Keele, Mr. Zafir described his role as follows:

I wear all different hats. I was everything and everybody. If there was no toilet paper, they ask me. If something broke, ask me. If something had to be done, ask me. I was everything. ...

Mr. Zafir said that around 1987, his involvement with Coldmatic changed; he spent less and less time on the plant floor and began to rely on others, specifically Brian Palmer, for plant and production supervision. He testified that much of his time was now spent in research and development, acquiring new companies, and communicating with similar companies in countries around the world. Occasionally he will perform a labouring task in the plant and in that sense views himself as still very much a "hands-on owner".

(b) Mr. Palmer, respondent

Brian Palmer, 31 at the time of the hearing, was born in Ontario and raised in St. Catharines. After high school, he worked in a couple of factories briefly as a general labourer. In September 1983, at age 19, he worked as an assembler for UCN for a few months prior to leaving on his honeymoon. He returned to find that he had been laid off. UCN was in financial difficulty and he was called back to work by the receiver in October, 1983. In January, 1984, UCN was purchased by Mr. Zafir.

Throughout 1984 and most of 1985, Mr. Palmer continued to work at UCN in St. Catharines. During this time, Mr. Palmer said that he was busy asking questions at UCN about other people's work, the machines, and observing the overall production. Still a general labourer, he said that he did not want to be "just a Joe Blow" assembly worker the rest of his life. He hoped to get ahead by asking questions and learning the business.

Some time in 1984, Mr. Palmer informed Mr. Zafir (through Coldmatic's drivers making deliveries to UCN) of his concerns regarding certain personnel and how the UCN plant was being run. Mr. Zafir called him to Toronto in the summer of 1984 and told him that he was thinking about merging UCN with Coldmatic. Mr. Palmer said he "jumped" at the opportunity, as he wanted out of St. Catharines "in the worst way" because of family tensions.

In August, 1985, Mr. Zafir moved UCN to Toronto, with Mr. Palmer its only remaining employee. A couple of workers were hired by Mr. Zafir to work with Mr. Palmer to set up the assembly line for UCN production in a building at Keele.

Mr. Palmer started with Mr. Zafir as an hourly employee, but by December, 1985 he was being paid a salary of \$30,000 for duties which neither he nor Mr. Zafir could name or describe with any precision. Generally, Mr. Palmer described his work as overseeing and working on the UCN product (assembly of delicatessen display cases) for a regular shift, after which he would travel to Chesswood to learn all that he could about the Coldmatic product, and assist Mr. Zafir in whatever way requested by him until midnight. He would return to his UCN shift early the next morning.

Mr. Palmer said that he was told to "stick by" Mr. Zafir and learn, which he was more than eager to do. While he received raises, he never inquired as to his specific duties. Always looking for new tasks to take on, he assumed the raises were generally in recognition of the "the work I was doing".

During 1986 and the construction of the new Coldmatic factory, which was to house the Coldmatic production lines, Mr. Palmer was Mr. Zafir's "contact" at Keele, relaying messages to those working at the site, from Mr. Zafir and others still working at Chesswood. He also participated in the move of Coldmatic from Chesswood to Keele which began in 1986 and was completed in the spring of 1987.

When Coldmatic moved in at Keele, the UCN production line was closed down. Mr. Palmer recalled asking Mr. Zafir: "What do I do now?". Mr. Zafir suggested he follow him around and observe. Mr. Palmer did so and by the fall of 1987 was actively handling work orders and some purchasing and independently supervising plant production, hiring new employees and disciplining them. At the time he maintained that he never had the authority to fire anyone without Mr. Zafir's approval between 1987 and 1989. Even in 1994, when he had virtually complete charge of plant production, he insisted that he would not fire anyone without speaking to Mr. Zafir first. Curiously, he testified that he only ever fired two people yet could remember absolutely nothing of their names or their circumstances.

Mr. Palmer is now making approximately \$62,000 a year. While he still claims he was never "called into a room and given a title", he acknowledged that he is currently, in all respects but name, the Plant Manager. His responsibilities extend beyond Coldmatic into other operations owned by Mr. Zafir. For the purposes of the complaint, I find that Mr. Palmer was either the de facto plant foreman, or the plant foreman-in-training by George Zafir, between 1987-89, the period addressed by Mr. Espinoza's complaint.

Mr. Palmer and Mr. Zafir presently have a very close and personal relationship. There is no doubt that Mr. Palmer models himself after, and sees himself as an extension of, Mr. Zafir in terms of attitude and aspirations. Mr. Zafir described Mr. Palmer at the hearing as being "like clay in my hands", and referred to him on more than one occasion as someone he wished were his son. Mr. Palmer was, he said, the one who would take the success of his companies "into the next century".

(c) Mr. Espinoza, the complainant

Born in Ecuador, with Spanish as his first language, Mr. Espinoza was 53 at the time of the hearing. Work was scarce in Ecuador and he left, at age 27, for the United States in October 1968. He lived there until 1986-7; his immigration status while there is not known. His wife did not come with him to the United States, emigrating to Canada instead in 1972. While he had visited his wife occasionally since 1972, he said that he only came to Canada "to stay" in 1986 or 1987.

Details surrounding Mr. Espinoza's arrival in Canada are unclear. At one point he said that he arrived on June 1, 1987, under a sponsorship application made by his wife. This application for sponsorship was "being processed" when he arrived, he said, and in March 1989, he had a work permit but was not yet landed. He became a permanent resident in 1991 and a Canadian citizen in July, 1994.

Mr. Espinoza's education was not stated. In giving testimony, he would often answer questions with what appeared to be incomplete thoughts or statements. This apparent taciturn nature made questioning difficult, and left considerable gaps in the information put forward.

Mr. Espinoza said that his work experience was mostly in factories: 2 years in a box factory in Ecuador; 1 year in a mirror factory, and 4 years in a clamps factory in the United States. He said he worked as a cook in a nursing home for 7 years while in Florida, and in the construction industry there, for indeterminate brief periods, prior to arriving in Canada.

Regarding language ability, he said that he used some English while living and working in the United States for over 18 years. He said that he had never worked in a place where as much Spanish was spoken as at Coldmatic. It is difficult to understand how he would not have known more English than he

claims to have had in 1987, given his professed use of it in American workplaces for many years. However, I accept, on the evidence heard, particularly that of Constable Corbeil, that when he needed the language at a critical point in March, 1989, he was unable to make himself understood in English.

Mr. Espinoza testified that his first job in Canada was at Coldmatic. He recalled arriving on a Monday and being met by Mr. Zafir. When he asked to speak to a friend who worked there, Elman Castillo, he said that Mr. Zafir asked him if he wanted to work. He did and began the same day as a general labourer on the plate press. He was taken to this area by Mr. Zafir and learned his duties by observing others and following Mr. Zafir's actions.

Mr. Espinoza's experience at Coldmatic will be addressed later.

4. The Coldmatic Workplace 1987-89

(a) Composition of Workforce

Only a few Canadian-born workers, such as Mr. Belisle, worked on the plant floor, which is the only area of Coldmatic addressed by the complaint.

The Respondents stated in their reply to the complaint on March 27, 1990:

...Our Company employs approximately 120 people now and at the time of [Mr. Espinoza's] employment. Of that number, in my opinion, 95% of them are immigrants. I myself do not class them as being from racial minority groups. Of this 95%, at least 45%-50% are Spanish speaking.

...We have workers from Italy, Spain, Portugal, Britain, Ghana, Brazil, Ecuador, Guatemala, Africa, Cambodia, Vietnam and India to name a few.

...It just so happens that in every department of our factory, there are Spanish speaking workers.

Of the workforce described as immigrants, the testimony disclosed a division between the "old" immigrants" - those who had been with Coldmatic at Chesswood - and the "new" immigrants - those hired at Keele. Of the "old" immigrants, only Messrs. Mustica, Bailey, Supo, and Castillo were heard from at the hearing. The "new" immigrants who testified at the hearing were all from Spanish-speaking countries in South and Central America, except for Mr. Bonsu who was from Africa.

Some witnesses spoke of the existence of two groups which differed on the basis of privileges received at Coldmatic. Those with privileges were exempt from Mr. Palmer's sanctions regarding behaviour and those without were intensely scrutinized by him and penalized. The group with privileges included mostly the "old" immigrants but also a few of the "new". The group without privileges was made up largely of "new" immigrants, mostly Spanish speaking.

Mr. Palmer's testimony more or less confirmed the two groups. He said that he was told by Mr. Zafir in 1987 that he could not do anything which would affect the people who had been with him at Chesswood, but was free to act as he saw fit regarding the rest of the plant workers at Keele. This essentially put Mr. Palmer "in charge" of the "new" employees (those who arrived in the country and at Coldmatic, almost simultaneously, from 1987 onward.)

(b) Hiring Practices

In 1987, Mr. Palmer and Mr. Zafir confirmed that Coldmatic had a dramatic increase in its workforce concurrent with its move to Keele - from approximately 45 to approximately 120 - and a rapid increase in market demand for the Coldmatic product. The economy was booming and workers were mobile, moving on to companies with more attractive offers. Both Mr. Zafir and Mr. Palmer felt the pressure of pending production orders and insufficient personnel

to meet the orders. Both testified that they were continually short of workers from 1987 to 1989.

Mr. Palmer said he had a very basic application form which was sometimes used. Routinely, however, few and sometimes no questions were asked of prospective employees in this period. As Mr. Zafir put it, if you were willing to work for the amount he offered, you could start almost immediately.

In describing those hired by him in the plant, Mr. Palmer differentiated in his testimony between the "desperate immigrants" and the "normal guy". When asked to define "normal guy", he said "one not immigrating to Canada". Few "normal guys" were hired. Mr. Palmer recounted how in the recent recession he received many applications from non-immigrants who were overqualified for a general labour position. Both he, and Mr. Zafir, felt that it would be financially imprudent to train someone who, they assumed, would not stay long with the company. Interestingly, these recession applicants were also described by Mr. Palmer as "desperate". When it was pointed out to him that some of the "desperate immigrants" were equally overqualified for factory work, given their backgrounds as chemical engineers, veterinarians, and accountants, he claimed to have no knowledge of those skills until hearing the testimony at the inquiry.

Mr. Mustica, the comptroller or accountant of Coldmatic, testified that he was routinely approached by fellow Spanish-speakers looking for other positions in the company, i.e. those who had university or special training in their country of origin. He said that uniformly he told them to learn English first and that no one came back to him, having learned English.

Mr. Palmer testified that he would often be approached by plant workers to hire someone they knew who was in need of a job to support families or to stay in the country. Some used names and social insurance numbers that were not their own. In some cases this was known; in others, not.

Training for general labour positions was on the job, with the favoured method of assignment predicated on the new employee's ethnic or linguistic background. For example, of the three main production lines, the German jig and the Makron line were the predominant placements for Spanish-speaking applicants. The rationale was that these were physical labour jobs requiring very little need for communication; also, in this period, two Spanish-speakers, Carlos Ramirez and Mario Figueroa, were in charge of these lines. Those with some English ability were placed on Paul Belisle's continuous line. Generally, however, linguistic groups were placed together either in an area or on a line.

The ability to speak English well or even at all was neither a job requirement nor a hiring consideration, either implicitly or expressly. The respondents claimed that English was a requirement for advancement within the company but the evidence did not establish that this was in fact the case. Several witnesses said that they were told to learn English as a reason for being denied a raise for doing the job they were already performing without need of the language.

(c) Management Style

The absence of a clear structure at Coldmatic in terms of reporting and direction became a critical factor in the evidence heard. Mr. Zafir made a point of not using titles or specific job descriptions, insisting that no one working for him really had one. He had no foremen, he said, and those that called themselves foremen, supervisors or lead hands were not designated as such by him. Asked why he felt so strongly about titles, he gave the following example: if a headhunter called and asked to speak to the General Manager, the fact that he had none meant that the headhunter would not be able to speak to him/her. Therefore, he would be able to keep the person, who, he acknowledged, would probably be known anywhere else as a General Manager. In other words, no titles were given by Mr. Zafir as he feared their effect, and it seems, their power.

More will be said later with respect to the structure of Coldmatic to the extent necessary to deal with this complaint.

I heard considerable testimony regarding the management style of Mr. Zafir, who still had some involvement in the plant production in this period, and that of Mr. Palmer.

Mr. Zafir was described by several witnesses, for and against the complaint, as "hot-tempered" and "demanding" and given to loudly yelling, in a berating and scolding manner, when he did not like what was happening. According to Mr. Mustica, Mr. Zafir could be heard yelling from anywhere in the plant. Some insisted he was unselective in this behaviour; it did not matter to whom he was talking. Others said he would "take advantage" and that this behaviour became rampant if one did not respond in kind. All were clear that he would behave this way whether the issue was someone driving a forklift into a wall or holding a broom the wrong way.

The only difference in the testimony heard was how one adjusted to Mr. Zafir's management style which was demonstrated by this behaviour. Some said you had to stand up to him; some said you had to ignore it, because he would forget it soon enough; some were simply frightened and humiliated.

Mr. Zafir did not quibble with these descriptions of himself, except to say that he yelled because he was justifiably mad, and that when he did, it was never at or about anyone, at least not to their face. This distinction was not supported by the evidence. One has to go to considerable sophistic lengths to say the following example of words used when upset, given by Mr. Zafir himself, was directed at no one and about no one:

A. "For Chrissake, what's your problem? You have one job. All I want you to do is concentrate. Where the hell did you come from? Don't you have a little bit of acceptance of quality work? I mean, where did you guys come from? Don't you think that I would like to teach you? And also, why don't you go in school? I pay you. I train you. How did you come here? Why don't you go to some place else

and do a bad job? Here I'm training you. Go to school. I pay you. Just learn enough to speak a few words. You could advance."

Asked by his counsel what he meant by "How did you come here". Mr. Zafir said:

A. "How did you find this company." That's what I meant. "How did you find this company? Why you didn't go to another company? Are we stupid? Can we do this? I must be crazy."

Asked by his counsel how he would react if he saw an employee not sweeping the floor "right", Mr. Zafir replied:

A. Ah, for instance, I take the broom in his hand and I show him. Show him how to do it. It's amazing, ah, that the sweeper pulls the dirt towards him instead of pushing away from him. And, ah, I even accept that one can do a faster job than the other one, but I'm looking for a good job. I want the place cleaned, neat, and I don't believe that anything wrong with that. And if I see that somebody's sweeping around an empty skid instead of picking up that skid, put it toward the other skids, and clean up the whole place -- I mean, that I call it a good man.

Q. You call a "good man" somebody who picks up the skid?

A. Yes.

Q. That's empty.

A. Not that I have to be a shepherd all the time and tell him how.

Q. And what do you say to the man who doesn't pick up the empty skid and sweeps around it?

A. "This is not normal, what you're doing. For fuck's sake, you are here for so many years and you don't know what to do yet? I feel sorry for you. This is ridiculous."

And sometimes I feel they do it purposely, and that bothers me.

From my own observation of Mr. Zafir during this testimony, he appeared to be reliving these moments of pique, as his demeanour became altered. Mr. Zafir said that when he is swearing he is not "selecting" his words. This was evident in his examples. Formerly replying to questions in a dispassionate almost

indifferent manner, his breathing changed, his face turned red, his face became distorted in an expression of disgust, and his voice escalated to a sustained shout. It was a striking display of unrestrained emotion.

Mr. Zafir was aware that communication was a problem in the plant. After giving the above example of the words he would use when angry, he said:

And you know, the funny thing is, so many people are very, very good soul, good people, if you somehow talk through an interpreter. And this is really not normal, because why I'm pulling the people together through an interpreter, that's time-consuming.

Now, I'm already cheaper. I'm losing money or making less profit, and I have to show the bottom line to the bank, otherwise I will be history...

While accepting that Mr. Zafir's outbursts may have been occasioned by quality concerns, a perceived mistake or incident, the words used and the tone of the delivery could leave little doubt to anyone in earshot, let alone those perceived as the problem, that they were being yelled at. This is doubly so, when one does not comprehend the words and has only the body language and tone to go by. Its effect on a person who, through physical proximity or action, triggered such anger on the plant floor at Coldmatic would depend a great deal on that person's level of comfort in terms of job security and on his/her personal reserves of self-esteem.

Most of the Spanish-speaking witnesses described Mr. Palmer's management style and behaviour in similar terms to that of Mr. Zafir, emphasizing the unpredictable outburst, the gratuitous insult, and derisive manner. Some said he was more restrained than Mr. Zafir, others said he was less so. In the Respondents' reply to the complaint, on March 27, 1990, the following is stated:

...I am in charge of all employees, including hiring and firing. I am the one who has hired most of our workforce...I am fair and lenient with all and give the same respect they give me.

...I do not single out Latin workers in any way, but carry my complaints through the proper channels within the factory.

Peculiarly, while this response uses the pronoun "I", neither Mr. Zafir nor Mr. Palmer would say to whom this referred, saying they could not remember, since the response was a group effort by themselves and Mrs. Zafir.

The "proper channels" or line of authority in 1987-89 appears to have been from Mr. Zafir, the owner, to Mr. Palmer, the foreman, assisted by select persons on the plant floor. While witnesses would refer to foremen of certain lines, their role in any chain of command was neither constant nor certain.

It was generally understood that there was one "boss": for those with little contact with Mr. Zafir, this was Mr. Palmer; for those who knew Mr. Zafir was the owner, Mr. Palmer was the de facto boss, his right hand man. For most, one's access to Mr. Zafir was limited, partly by language and by his absence from the floor, but also, in some instances, by express instruction. A number of witnesses said that going to Mr. Zafir directly, as owner, with a concern meant being summarily referred back to Mr. Palmer, as foreman, and vice versa.

Mr. Zafir emphasized that he viewed everyone equally and was always accessible. Formerly he might well have been, but in this period he was actively divesting himself of responsibilities in favour of Mr. Palmer. He acknowledged that his new reliance on Mr. Palmer created some rancour among the "old" employees from Chesswood, who complained and clearly resented Mr. Palmer's new role and authority at Coldmatic, given his young age and short time with the company.

(d) Written Policies

A written policy was introduced into evidence in Mr. Palmer's testimony near the end of the hearing. An undated booklet purporting to set out Coldmatic policy was 10 pages in length and addressed vacations, leaves of absence, and

statutory holidays as well as 28 "Rules of Conduct". These rules, prefaced with the words "committing any of the following violations will be sufficient grounds for disciplinary action..." ranged from "fraud and theft" and "possession of weapons" to "loafing or loitering, wasting time during work hours" and "using abusive or profane language".

Both Mr. Zafir and Mr. Palmer acknowledged that the booklet was not a practical factor in the workplace and this is confirmed by the fact that no witness made reference to it over several days of hearing. Mr. Palmer said he faithfully followed one provision: that employees absent 3 days without notifying the Company "will be considered to have voluntarily quit". He read the provisions along with counsel questioning him, as though for the first time. He did not know much about the origin of the booklet. He thought it was introduced effective January 1988; when challenged, he insisted he was correct until checking his records overnight and concluding it was January 1989.

Mr. Zafir said that he created the book himself, culling from samples he kept of such policy books he had seen used at other businesses. He too had only a vague understanding of the book's contents and the period in which it was in effect. He recalled that it was read out in English to workers gathered around Christmas, 1988 for his usual short "We are like a United Nations" speech. He could not recall how long it was in effect. He recalled it was introduced at the same time as a benefits package which was discontinued about a year later. He thought it might have been distributed to new employees in 1989. It was never distributed to all employees but he thought it might have been on a bulletin board for a time.

Other than this booklet, of indeterminate history, both Mr. Zafir and Mr. Palmer confirmed that there were no written policies affecting the workplace at any time.

The impression left by the testimony regarding the booklet was that it was not in effect for long and did not have any impact in practice on the plant floor. I am satisfied that this booklet was essentially window-dressing.

5. The Complaint

The complainant's representative asked the Board to compel the respondents to call a key witness to events alleged in the complaint, Carlos Ramirez, who was slated to be called but, at the last minute, was not.

Generally, it is left to the parties in Board proceedings to decide which witnesses will be called in support of their position and it is not uncommon that changes will be made as the hearing progresses for a number of reasons, including strategy. However, in this case, the complainant raised some concerns regarding abuse of process and fairness in that counsel for the Respondent had put questions to a number of witnesses regarding statements alleged to have been made to him and others by Mr. Ramirez. I do not doubt that at the time these statements were made, as I was assured by Respondent counsel, that he intended to call Mr. Ramirez to confirm the statements in testimony. His offer at the end of the Respondents' case to let Mr. Ramirez be called in reply by either the complainant and OHRC was specious, however, as it could not possibly address the unfairness caused by the unsupported statements. The witnesses affected by the statements in cross-examination had completed their testimony. The parties were strongly encouraged to work out some arrangement satisfactory to them regarding putting Mr Ramirez' testimony before the Board. They were unable to do so.

Given the essentially adversarial nature of the proceedings, I was not prepared to compel a respondent to call a particular witness, even one whose testimony was as significant to the issues as Mr. Ramirez'. I advised that the failure to call

Mr. Ramirez in the circumstances would lead to the inference that his testimony would not have assisted the Respondent's case. Further, I could give no weight to the unsubstantiated statements made by counsel in cross-examination.

(a) Locker incident in July 1987

In July, 1987, the open concept building at Keele contained a number of production lines, a glass door construction area, a carpentry workshop, a reach-in cooler assembly area, shipping and receiving areas, among other things. At all times there was one washroom facility containing 3 toilets, 3 urinals, a half-moon spray-style sink for handwashing, and 2 hand dryers. A single toilet was located in the shipping area. There were no locker room or cafeteria facilities. A number of free-standing lockers, full and half size, in various states of repair, were located in an open area next to the plant's main washroom facility. Also in this area were 3 or 4 picnic tables. Workers kept their lunches, change of clothes and any personal belongings either with them at their machines, on the picnic tables or in the lockers, if available.

Further construction was undertaken in the fall of 1987 when Mr. Zafir realized his design did not make optimum use of space available. As part of this redesign, a locker room and a lunch room was included. Mr. Zafir said he found it embarrassing to take visitors through the plant and have them see workers changing their clothes in the open area by the lockers. Also late in 1987, annual locker cleaning during the seasonal December shutdown was initiated.

Sometime in July, 1987, Mr. Supo came out of the washroom and saw Mr. Zafir throwing clothes, food and personal belongings, taken both from the lockers and picnic tables, into a box or boxes. He returned to his production line and told the others what was happening. He, Mr. Espinoza and others went to protest Mr.

Zafir's actions. Mr. Carlos Ramirez (then leadhand/foreman) spoke to Mr. Zafir on his and the others' behalf.

I accept the testimony of Mr. Espinoza, Mr. Castillo, and that of Mr. Figueroa, that the emptying of the lockers was not part of any scheduled cleanup, and was not preceded by a notice, in English or any other language. The Respondents' reply to the complaint in 1990 suggested that employees had been asked to empty their lockers for cleaning:

Some workers obliged, others didn't. As the mice problem and smell grew bigger we emptied all belongings from the lockers and, I stress, put them all in a box for the workers to sort out.

The testimony at the hearing regarding prior notice, from Messrs. Zafir, Palmer, Bailey and Belisle, was uniformly flimsy and vague. Mr. Zafir's own testimony strongly indicated that his actions were spontaneous. He said that he was walking by the lockers when he saw a rat and then:

...this is still a nightmare to me....That what happened, the whole thing happened to me, and a big rat just running out of one of the cupboard like crazy. And I went just -- just nuts. I mean, I got scared and I went nuts to see that this is a brand new building and what happens.

Mr. Zafir then said that he called a Mr. Kovacs over to help him empty the contents of the lockers. Mr. Zafir said that he had "systematically" placed clothes on hangers and hung them inside one box, and threw only obviously soiled clothes in another box. Mr. Zafir said that the whole incident was "blown out of proportion" by Mr. Espinoza and that no one was harmed or lost anything.

Most witnesses spoke of items being heaped together in one box - food, clothing, personal belongings. I find it highly unlikely that Mr. Zafir, who described himself as going "nuts", took the time to find and use hangers and make the careful divisions he spoke of at the hearing. It is more probable that he grabbed a box and threw the items in a display of disgust.

Mr. Palmer described the situation as follows:

A. Well, there was a lot of commotion, a group of people there, you know, 15-20 guys approximately. George Zafir was there. There were a couple boxes sitting in the middle of the floor, and the employees were yelling, upset. From what I saw on the scene, some of the lockers were open and inside the box -- boxes there was clothing and garbage.

Q. What was George Zafir doing at that time?

A. When I arrived he was basically doing nothing. He was telling the guys to get back to work or else they were in jeopardy of losing their jobs. It was -- basically when I had arrived on the scene it was an argument between the guys that were there and George Zafir.

The direction by Mr. Zafir to return to work resulted in a dozen or so walking out in protest. This group included Mr. Espinoza, Mr. Ramirez, Mr. Supo, Mr. Castillo and Mr. Figueroa. (The latter had just joined Coldmatic a few weeks earlier through his friend, Carlos Ramirez. He said that those who walked out were "legal", suggesting those who stayed lacked such immigration status.)

The evidence of most of the witnesses was that the belongings were mostly those of Spanish-speaking workers on Mr. Ramirez' line. The event was seen by them as an unexpected, unjustified invasion of their privacy and unauthorized disposal of their belongings.

The police were called to Coldmatic and apparently told the workers that no charges could be brought as Mr. Zafir promised them he would repay anyone for monies lost. Mr. Zafir said that he paid nothing as nothing was lost. Some witnesses said only those who stayed were repaid. Mr. Espinoza claimed he lost \$60 and was not repaid. He said that when he returned he complained about it but Mr. Zafir said: "I have already given you a raise and that remains. I am not going to give you back \$60."

Some of the workers, led by Mr. Ramirez, went to seek redress by going to a government office "downtown", and were informed that nothing could be done by

these offices about the incident. A few days later, most had obtained jobs at a competitor factory, returning to Coldmatic at various times over the next year after being promised more money by Mr. Zafir. Mr. Zafir confirmed this, saying that the factory had just expanded operations with the completion of the German line and he was always short of workers and having difficulty meeting production targets in 1987.

(b) The Forgotten Raise 1987-88

Mr. Espinoza testified that Mr. Zafir promised him a \$1.50 an hour raise in two stages, one on returning in October, 1987 and the second three months later. He said that he received the first, but not the second, speculating that it was because he had a workplace injury in the fall of 1987. No evidence was proffered by the respondent to refute his claim that the second half of the raise was unpaid or that the raise promised was not \$1.50.

(c) The Paycheque Incidents - 1987-89

i) general cheque distribution

Mr. Mustica stated that the payroll was created from workers' punch cards which were collected on Wednesday mornings. Work time was estimated then for the Wednesday, given the workers had no cards to punch out their time that day. Workers were paid bi-weekly. Any discrepancies between this estimate and actual time worked, which were brought to the company's attention, he said, would be added or subtracted from the next two week period.

Mr. Mustica said that it took 2 1/2 days to complete the payroll paper work. Cheques were put in envelopes with the workers' number and name on the front. These envelopes were filed numerically and put in a box and given to Brian Palmer. Mr. Mustica recalled that most times Mr. Palmer and Mr. Zafir were present for the cheque distribution in the plant and he would wait in the office to address any problems that arose.

Mr. Palmer said that cheques were distributed on Fridays at the end of the shift, and that he mostly did it by himself. He would stand (or sit) by the punch clock, holding the box of envelopes. He probably called out the numbers but was not sure; he did say he would not call out the name unless he found the person's face unfamiliar. It was evident from his testimony that he did not have a good recollection for names and would not often call people by their actual names, claiming it was too difficult as many were too similar. Instead he used names he chose, as he states below:

A. Well, it's difficult for me to give names of Chinese people, because I call them nicknames like "Peter", you know, but his name is [---] or something like that. I really can't -- you know what I mean? Like I call him Peter, because that's what he likes --

Mr. Mustica, Mr. Palmer and Mr. Zafir allowed that the process rarely went like clockwork. Either a person got the wrong envelope or the envelope was misfiled. It rarely went like clockwork and the inevitable protests were summarily waved down by Mr. Palmer and the person told to go to the end of the line and wait till he was finished.

ii) Mr. Espinoza's claim

Mr. Espinoza's complaint refers to envelopes being thrown by Mr. Palmer in the faces of Spanish-speaking workers. At the hearing, he first said that this was an error and later:

When I found out what was written [in the complaint] I tried to rectify it but it was too late. He threw the cheque at me like and --

...

'--- it, I had to catch it in the air cause it hit me on the face and it landed on the floor.

Mr. Espinoza demonstrated in the above testimony that Mr. Palmer's gesture was to raise his arm above the shoulder and bring it down to his side with force, releasing the envelope in doing so.

Mr. Espinoza said that Mr. Palmer threw the cheque twice and withheld it once for a short time. The first incident he did not report, the second, he reported to Carlos Ramirez, and the third, to Mr. Zafir. He also testified that these three times were after he had returned to work following a work-related accident. He speculated that the behaviour was "because they started hating me and they wanted to fire me after I went for a few months on compensation".

I accept Mr. Espinoza's evidence on this issue. It is consistent with the impression left by much of Mr. Palmer's and Mr. Zafir's testimony. Mr. Belisle described Mr. Palmer as giving vent to his anger by "throwing papers around" and Mr. Zafir gave the following as an example of what he might say to a worker when upset:

"I mean, you do this, you going go on Workmens Compensation. It's going to cost more for the company. We not be able to compete. And in the meantime, you dislocate your shoulder and you are away for God knows how long. This is crazy."

Mr. Zafir without question prided himself on cutting corners and put a premium on anyone who demonstrated as much devotion to the success of Coldmatic as he did. As his protégé, Mr. Palmer would have adopted this approach, no doubt concerned that costs incurred in his area would reflect badly on him in Mr. Zafir's eyes.

Mr. Palmer categorically denied ever throwing or even dropping an envelope, in all his years at Coldmatic. I do not accept his testimony on this issue. It was clear from all the evidence that Mr. Palmer had little patience with this function, despite his statement that he never got angry because he was the person "in control". Both he and Mr. Zafir testified, with a sense of irritation, that workers

would leave their stations before the whistle to run to the distribution area in a race to be first in line so as not to have to wait while a hundred others got their envelopes. Given the fevered atmosphere they described, and the apparent agitation it created, it is improbable that an envelope or two would not have been dropped over the years, whether intentionally or not.

Having observed Mr. Palmer and Mr. Zafir in public hearings over several days, and their emotional and physical displays of annoyance whenever anything was said with which they disagreed, the probability of such a display in the privacy of the workplace at Coldmatic is high.

(d) The Altercation in March, 1989

i) Details

The date of the fight between Mr. Espinoza and Mr. John Mensah was given as March 3, 1989, both in the materials and by the parties. It is not disputed that both were sent home the same day. The police officer who testified gave the date of the incident as March 2, 1989, a Thursday, and I accept this as a more reliable source of the date, given that separation papers were issued months later.

At the hearing, Mr. Espinoza said that he and Mr. Mensah were both working on the German line in March, 1989. He said that Mr. Mensah was:

a good worker, good guy, who got -- well that day I don't know whether he was inebriated or something, but he was like crazy.

Mr. Espinoza described the incident as follows:

A. Because one day at the beginning of the working day, a black guy arrived, his name is John Mensah and tried to attack [Vinicio Jaramillo]. He started insulting him and telling him that he was a fucking Hispanic. So the black guy pushed his finger like that into Vinicio.

THE CHAIRPERSON: Indicating the index finger into his throat under his jaw line?

THE WITNESS: And I was on the other side and I asked him, "What's going on? Just keep quiet." Then Mr. Otto Ortiz tells John Mensah, "Take it easy." And John Mensah was about to hit Mr. Ortiz.

...

So I was across the table, told John. "Hey, John take it easy." And then John goes over the table and hits me here and knocks me to the ground.

THE CHAIRPERSON: Here in the jaw you're talking about?

THE WITNESS: Here, he broke all of this.

THE CHAIRPERSON: Indicating your face between your nose and your mouth?

THE WITNESS: Yes. So at the same time I fell on the ground and I cut myself on some lockers that were on the ground.

It was clarified that he cut his elbow on iron corner pieces used on the assembly line to secure or lock the panels in place. He said that Mr. Mensah jumped across the German line, to where he and Otto Ortiz were standing, and hit him.

ii) Reporting to Coldmatic

Mr. Palmer in the Respondents' reply in 1990 said:

Yes, Mr. Espinoza came to me. No, I did not fire him on the spot. I went to the work area to get the other side of the story from "John". At that time, I instructed both employees punch out and go home for the day. I did not fire them. Neither one returned to work the next day. Our company policy states any employee not reporting to work for three consecutive days, without phoning, is considered as a forfeit of their employment. ... When I asked the other workers what had happened, no one wanted to talk. Yes the foreman came over, and he didn't know what happened either. He was working in another area.

At the hearing, however, his testimony confirmed that while he spoke to Mr. Mensah, he did not speak directly to anyone other than Mr. Ramirez who reported no one would say anything. As for his discussion with Mr. Mensah, he

said he obtained no more information than Mr. Ramirez had, "only fingerprinting".

In his testimony, Mr. Espinoza said that when he reported the fight to Mr. Palmer, he was told: "Go home, there is no work for you, stupid Hispanic." He said that Mr. Palmer "didn't want to know anything about it, he immediately told me that I should go back home and that there wouldn't be any further work for me".

Mr. Palmer confirmed that he told Mr. Espinoza to "be quiet" and that he wanted Mr. Ramirez to talk to the other workers on the line and report back to him. In other words, Mr. Ramirez was not acting as translator for anyone, but as an intermediary for Mr. Palmer. Mr. Ramirez, who had not seen the fight, told Mr. Palmer his opinion that both should be disciplined, not just one. According to Mr. Espinoza, this was because Mr. Mensah "had started the problem"; and according to Mr. Palmer, because he was getting "no straight answers".

iii) reporting to police

Mr. Espinoza, or someone on his behalf, called the police. Constable D. Corbeil said that Mr. Espinoza came up to him outside the plant and:

...because of his poor English, I had to stand there and decipher, basically, what he was trying to say. And I got the gist of it, that an assault had taken place and he was in a fight with another party. Based on that information from him, I investigated further by going inside the plant and talking to --- Brian Palmer.

Mr. Espinoza said that he asked Mr. Palmer to have Mr. Ortiz act as a translator, but he refused to take Mr. Ortiz off the line. This attitude on Mr. Palmer's part was corroborated by Constable Corbeil, the investigating police officer, who said Mr. Palmer told him:

You are absolutely not going back there, if you do it will stop production. There's no way you are going back there.

The officer elaborated on his encounter with Mr. Palmer that morning as follows:

What took place is I was talking to Luis Espinoza out in the parking lot. I just went inside to find out what exactly happened to clarify things and to talk to Brian Palmer. And I wanted to talk to the other party involved. I believe Brian Palmer said that it was John Mensah. So I said I wanted to speak to him. He said, well, you can't go back there because the factory would be stopped. I said, well, that's too bad, I'm going to have to talk to him. Basically, again, this is best of my memory. He said, well, let me go back and get him. And he said he was sent home as well.

So I never did speak to John Mensah, I just never saw him.

...After that I went and briefly talked to Luis Espinoza again. He said, basically, he wanted just to report it, he did not want to lay charges, that he was leaving the company. Whether he was laid off or fired, I cannot recall.

THE PRESIDING CHAIR: And, again, I realize this is some time ago, but you are saying that your memory is coming back, how would you describe Mr. Palmer's demeanour when you came in?

THE WITNESS: When I first came in to answer initial questions, it was all right. But when I wanted to go back in the factory I became a nuisance.

...I don't think he understood police procedure because I think he thought he could stop me from going back there.

THE PRESIDING CHAIR: And that was clarified how?

THE WITNESS: I told him, well, I can go back there, basically. If he wanted to stop me he'd be in trouble. He could be arrested. ...

The police officer indicated that he did not pursue the matter when Mr. Espinoza did not lay charges. He said that he was told by Mr. Espinoza that he "would not be working at the company any more" and added:

THE WITNESS: The reason I remember it [that he was leaving the company based on the fight] is because I felt bad for him. He could hardly speak English and he told me he had a family and he was not going to be working there any more, so I felt a little bad for him; that's the reason I remember it.

iv) Findings

Carlos Ramirez, in a telephone interview with the OHRC investigator on July 21, 1993, was asked why Mr. Espinoza was no longer working at Coldmatic. His reply was noted as follows:

He was fighting with another guy. I was the foreman at the time, he thinks I didn't do anything for him he went to Plant Manager and told him to go home for the day. He continued arguing and he let him go. I don't remember fight I was far awara [sic] when I came I separated them and after he went to Brian I explained. Just because I'm Spanish I can't be on his side. Brian fired both men.

Mr. Bonsu, a friend of Mr. Mensah, understood from a conversation with Mr. Mensah later that evening that he had been fired.

Vinicio Jaramillo recalled the fight but not hearing Mr. Mensah say "Fucking latins". He recalled that Mr. Mensah jumped across the production line and kicked Mr. Espinoza in the face but nothing more. Even though he drove to work with Mr. Espinoza everyday prior to the fight, the next day he just took the bus and asked no questions. His testimony and his attitude can be summed up in his statement below:

A. As I repeat myself, the first thing I learned coming to Canada was to get away from instances that would cause me problems.

Mr. Figueroa said when he arrived at 7:40 a.m. that day he saw Mr. Espinoza in the locker room with a bruised face. He said that Mr. Espinoza told him of the fight and he went to see Mr. Palmer, returning to explain to Mr. Espinoza that he was suspended for one day only. I do not find this credible since the police officer was on the site from 8:17 a.m. until 9:07 a.m. and clearly at that time, the indication from Mr. Espinoza's demeanour and statements was that he had lost his job, not just one day's pay.

Mr. Palmer's claim that Mr. Espinoza lost his job, only because he was absent for more than three days is not accepted. No record of employment was issued until July 8, 1989. If the triggering event in severing the employment relationship was the 3 day abandonment policy, as now claimed by Mr. Palmer, one would expect this to have been issued much earlier. His claim that he had no firing authority in 1989 is inconsistent with two witnesses - Angel Jara and Hugo Videla - who claimed they were fired by him in this period.

I accept that the altercation between Mr. Espinoza and Mr. Mensah involved a racial or ethnic insult which may or may not have been triggered by a work-related dispute, and that both were fired, not sent home for the day. I accept that he and Mr. Supo returned to ask Mr. Palmer for the job back a few days later and were told by Mr. Zafir that if Mr. Palmer fired him, there was nothing he could do. The effect of this dismissal in the human rights context of a claim of a poisoned work environment will be discussed later.

6. Poisoned Work Environment

(a) Background

The Board heard testimony from Mr. Espinoza and a number of similar fact witnesses on the question of derogatory language and insults directed at Spanish-speaking workers at Coldmatic.

Many of the witnesses raised their immigration status in their testimony. Some said they were being sponsored; some claimed refugee status at some point, some had no papers at all. The relevance of this fact is only to illustrate extraneous circumstances which could serve to further enhance the power imbalance inherent in most employment relationships. According to Mr. Figueroa, "having it" made people feel more secure to speak up, testify or to deal with the tensions in the workplace. "Not having it", according to Mr. Vinicio Jaramillo, meant you did nothing to draw attention to yourself, which included

"not seeing or hearing" and generally looking out for oneself as quietly as possible.

Having status in Canada and not having it, in my assessment, accounted for at least some of the discrepancies in the testimony of the three Jaramillo brothers. Cesar and Vicente testified regarding their workplace, believing they might risk their employment but not their legal status in Canada. This had already been finally determined by immigration officials. Vinicio, on the other hand, had no such comfort as his status was still under active review. Whether this was the sole cause of the latter's argumentative and unreliable testimony, I cannot be certain. In contrast, I found the testimony of his brothers, Cesar and Vicente, to be very credible, providing valuable insights into the workplace at Coldmatic.

(b) Witnesses

Other than Mr. Espinoza, the Board heard testimony from Messrs. Supo, Jara, Rivarola, C. Jaramillo, and E. Castillo in support of the complaint, all of whom were at Coldmatic between 1987-89. Also testifying for the complainant but respecting periods after Mr. Espinoza left were: Messrs. N. Ramirez and Vicente Jaramillo.

All of the witnesses called in support of Mr. Espinoza's complaint were born in Ecuador, except for Mr. Rivarola who was born in Peru. All arrived in Canada between 1987 and 1991, except for Mr. Supo and Mr. Castillo, who arrived in 1979 and 1984 respectively. All began working at Coldmatic within days or weeks of arrival.

Other than Mr. Zafir and Mr. Palmer, the following witnesses were called to give testimony on behalf of the respondents: Messrs. Humberto Mustica, Paul Belisle, Lance Bailey, Kofi Bonsu, Hugo Videla, Sandro Santiana, Wilson Canivilo, Mario Figueroa and Vinicio Jaramillo.

Coldmatic was the first job in Canada for only Messrs. Jaramillo, Videla and Santiana. The rest were in Canada for some time prior to arrival at Coldmatic. All are currently working for Coldmatic, except for Mr. Videla. Kofi Bonsu and Lance Bailey were born in Ghana and England, respectively. Paul Belisle was born in Canada. The remaining witnesses were born in Central and South America: Messrs. Mustica and Videla (Argentina); Mr. Figueroa (Guatemala); Mr. Canivilo (Chile); and Messrs. Santiana and Jaramillo (Ecuador).

The following are individual recollections of the work environment at Coldmatic as it relates to Mr. Espinoza's complaint.

i) Luis Espinoza

Mr. Espinoza said that he felt those on the German and Makron line were more mistreated than others with more seniority who worked in other areas of the plant, because most were "Hispanics or the Latins...sometimes there were blacks there but they didn't like to be mistreated and they left, there were a few blacks left." Mr. Espinoza said that the only person Mr. Palmer did not mistreat in this area was Mr. Figueroa.

The mistreatment was described as insulting workers by calling them "ignorant spanish speakers" and "assholes". He recalled Mr. Zafir stopping him when he wanted to use the washroom about half an hour before the end of the shift:

...I was going past to the washroom and he stopped me by the door, he insulted me and told me that I was forbidden to go to the washroom before leaving work. And he would do the same thing to many of the other workers. Mr. Palmer would turn the light off, for example, while they were in the washroom.

Apart from the incidents set out in his complaint, Mr. Espinoza testified that he would be insulted by Mr. Palmer as follows:

... I went to ask Mr. Palmer whether Mr. Ramirez had ordered [some cardboard pieces used on the panels] because there wasn't enough for what was required for the work. And Mr. Palmer insulted me and told me that I had nothing to do with this because I was nobody, that I should go back to my work cause I was nobody to give him orders, that I was a stupid Spanish speaker and I told him, "Well, fine." And he started insulting me, so I left him and I told him that there was not enough work.

He also recalled an incident during his first year at Coldmatic involving his son who had come to work there for the holidays. He said that he and his son were carrying a metal panel, holding it above their heads:

It was not heavy work carrying -- the two of us. And Mr. George was behind insulting us since we were both Latin. We were "stupid Hispanic assholes" and that we were going to damage the panel as we were carrying it like that.

But I told my son let's throw [the panel] on the ground and leave this sort of garbage work, but my son didn't want to do it -- do that.

After his return to Coldmatic in October, 1987, he said that he was walking in the plant carrying a coffee, when he passed Mr. Zafir who was drinking coffee with Alex Santoro at a table:

...I went by and he started insulting me and telling me that I was dripping coffee all over the floor, when in fact the lid was on.

And he was calling me a "stupid Spanish speaker" and I turned around and I told him, "Wait, George, this is very discriminatory towards employees." Then he came to where I was with the coffee and he said "No, I don't discriminate against anybody." And I told him, "Yes, George, you discriminate against Hispanics" and he told me that, no.

On another occasion --

...

I was about to get changed and the lockers were full and Mr. George went by and he said that I was spitting on the ground and that wasn't the case cause oil was spilled and he insulted me in front of all the other employees.

In the fall of 1987, Mr. Espinoza said that he injured his back carrying a metal plate at Coldmatic and brought in a doctor's report that he was to rest for a few days. When he told Mr. Zafir, he called him a "lazy Hispanic" and a "fucking Hispanic", and told him that "he had sort of a sore back and he was here again working there".

Mr. Espinoza said that Mr. Zafir would "climb to a vantage point upstairs...from which he could observe all the workers" and "when he noticed something he would appear behind the fridges and one would not even notice when he would be behind somebody yelling."

I heard considerable testimony with respect to the plant layout in 1987-89 and accept what Mr. Espinoza described as "like the second floor, second storey" was an open mezzanine or loft at one end of the new factory, which was subsequently closed in as part of the office areas. Mr. Zafir said that this area was used for storage of items for the factory and also for office records and other miscellany from companies he acquired. While he acknowledged he would have reason to be there, and described the workers coming out of their workstations "like ants" at the end of the day, he insisted he had no "vantage point" to "spy" on workers as there were many obstructions to his line of view in the open concept plant.

ii) Angel Supo

Mr. Supo, born in Ecuador, arrived in Canada in 1974 and began at Coldmatic in 1979, speaking "almost no English". Leaving in the July, 1987 walkout and returning in June, 1988, at Mr. Zafir's request and offer of more money, he said he was fired in May, 1992 for no reason. (Carlos Ramirez, in his 1993 telephone interview with the OHRC investigator, commented that both Mr. Supo and his son were "laid off for no reason".)

Mr. Supo testified that at Chesswood, Mr. Zafir, as both boss and foreman, would swear and say things like "why not fucking speak English", but would also treat the workers on occasion to beer when the weather was hot, or fast food, when working overtime. He said that the work atmosphere at Coldmatic changed after the move to Keele and Mr. Palmer came into plant production.

Mr. Supo described Mr. Palmer as one who insulted workers frequently, calling them "fucking Spanish" or "fucking assholes" and saying derisively "why not go to school" when their English was insufficient. He said Mr. Palmer would tell him to "Fuck off" when he requested a day off, and he felt unable to respond in kind because Mr. Palmer was the "foreman", and Mr. Zafir, the "boss".

Mr. Supo felt quite strongly that there were two groups at Coldmatic. The "other" group included Alex Santoro, Joe Da Silva, Mario Figueroa, Carlos Ramirez, Lance Bailey, Chris Fargas and Paul Belisle. Other than Mario Figueroa, these were all "old" employees from Chesswood. While Mr. Supo was also from Chesswood, he identified, or was identified, with the group described by him as "Spanish speakers - those who do not speak English".

Mr. Supo said that the two groups were subject to two different sets of unwritten rules in terms of discipline for smoking in prohibited areas, talking, receiving phone messages, lateness, and washroom use. He said that Mr. Palmer would stand by the washroom and say to Spanish-speakers: "Where are you going? Go back to work!" He felt that Mr. Palmer would time the Spanish-speaking workers using the washroom but if Alex Santoro approached, even just to wash his hands, Mr. Palmer would say nothing.

Mr. Supo's factory experience was that if you arrived late you would have to wait until the next hour to work, thus losing one hour's pay. However, he observed at Coldmatic that if a Spanish-speaking worker arrived even 2 minutes late, he would be sent home by Mr. Palmer or Mr. Zafir, thus losing the whole day's pay.

If one of them asked for permission to leave at noon, Mr. Palmer would send them home and tell them not to return for three days, to discourage such requests. Mr. Supo said that there was no one to whom he could complain: if he went to Mr. Zafir, he would be sent back to Mr. Palmer with the statement "He's the foreman."

iii) Angel Jara, Jose Rivarola, Nervo Ramirez

Angel Jara, born in Ecuador, arrived in Canada and at Coldmatic in September, 1988, getting the job through Mario Figueroa and Carlos Ramirez. He recalled that Mr. Zafir once "in a good manner" told him to learn English, at least 85% of it. When he replied that he did not even know 85% of Spanish, his native language, Mr. Zafir understood and left. However, Mr. Palmer stayed and in a "very despotic manner" turned and said to him: "You heard, you fucking asshole, what you have to learn - you have to learn English."

Mr. Jara said that he was always "working in fear" and that looking at Mr. Palmer was like looking at a "monster", because he insulted him and others and made threats about firing them. Mr. Jara said that Mr. Palmer constantly referred to him as "motherfucking son of a bitch", and drily reminded him of his real name at the hearing. He said that while the duration and number of washroom trips were tracked for the Spanish-speakers, those of the Italians, Greeks, and Portuguese were not. The one exception to this, he said, was Mario Figueroa, whom he described as Mr. Palmer's right hand man.

Mr. Jara felt that the Spanish were singled out by Mr. Palmer because most could not speak English and therefore were not as free to leave, as there were not many factories with as many Spanish speaking workers. This observation was echoed in the OHRC telephone interview with Carlos Ramirez in 1993. Asked if Mr. Palmer "ever verbally abused any Spanish speaking employee", he replied:

Yes, for me it's hard for me to say, it's hard because I have a good job. Just the Plant manager, not the owner, Brian doesn't get along with people, if they don't speak English.

Mr. Jara was fired by Mr. Palmer, he said, for not cleaning some desks and a bathroom. When told to do so with the usual derogatory words, he refused and Mr. Palmer told him he had to leave Coldmatic the next day. Instead, he quit and told Mr. Zafir who talked to Mr. Palmer, and then did nothing further.

Jose Rivarola, born in Peru, arrived in Canada and at Coldmatic in December, 1988, having heard about it through a former employee. He is still at Coldmatic.

Mr. Rivarola said that he was suspended by Mr. Palmer without pay for periods of 3-5 days on three occasions, after Mr. Belisle complained about him. These suspensions were distinguished from the usual layoffs for shortage of work and were interpreted as a form of discipline utilized by Mr. Palmer.

Mr. Rivarola said Mr. Palmer would call him Spanish and then laugh, and once called him stupid. He felt that both Mr. Palmer and Mr. Zafir "only look for something evil".

Mr. Rivarola referred to incidents in 1991 and 1993 regarding Mr. Zafir and a policy prohibiting the use of toilet paper to dry one's hands. This policy reflecting cost concerns was raised and confirmed by Mr. Zafir in his own testimony who gave Mr. Rivarola as an example of someone he tried to assist but would not assist himself. Mr. Rivarola was called in reply to respond and the evidence regarding a request for a job transfer was at odds both regarding motivation and assistance offered. In my view, both the toilet paper incident, relating to a specific subsequent policy, and the reassignment dispute, occurring during the course of the hearing, have little probative value in determining the issues before me and I will not address them further.

Nervo Ramirez, born in Ecuador, arrived in Canada in May, 1990 and at Coldmatic in June, 1990. He got the job through his brother, Carlos Ramirez, a person much mentioned and conspicuously absent during the inquiry.

Mr. Ramirez said that he felt so “mistreated” by Mr. Palmer that he left Coldmatic in March, 1993. Mr. Ramirez, a veterinarian by training, was strongly of the view that as an intelligent person, it was not necessary for others to ridicule or yell at him if he made a mistake such as leaving a machine running for 10 minutes. He described Coldmatic, between 1990 and 1993, as having a stressful and “very heavy atmosphere” because Mr. Palmer at any moment could “explode and treat you bad” if there was something he did not like.

Mr. Ramirez said that he had been, and had witnessed other Spanish-speaking workers being, insulted and called “fucking asshole, son of a bitch” and “stupid” by Mr. Palmer. Mr. Palmer’s behaviour, he said, was “not an appropriate way to treat human beings”. Mr. Ramirez, who did not speak English, complained to his brother, noting that Mr. Figueroa had told him that Mr. Palmer had prohibited communication between the workers and Mr Zafir.

When Mr. Palmer swore directly at Mr. Ramirez a second time, he quit and eventually took a job with less pay because he “preferred lower pay to bad treatment”. Mr. Zafir’s suggestion that Mr. Ramirez left because of problems with his brother, not Coldmatic, was not supported by any evidence.

iv) Cesar Jaramillo

Born in Ecuador, Mr. Jaramillo, an industrial chemist, arrived in Canada and at Coldmatic in September, 1988. Still employed there, he expressed fear of reprisal in testifying.

Mr. Jaramillo said Mr. Palmer would arbitrarily send a worker home for a period of time without pay. In one instance where this happened to him, he spoke up

and Mr. Palmer backed down. Mr. Jaramillo said that he had a back problem while working the Saturday before his wedding, and Mr. Palmer became angry with him for not volunteering to unload some items from shipping. He was told to go home and not come back until Wednesday. As Mr. Jaramillo had planned to ask for Thursday and Friday off because of his wedding, he protested and was then allowed to return on Monday and take Thursday and Friday off.

Mr. Jaramillo confirmed that washroom use was a source of comment by Mr. Palmer. He said that he once told him to dry his hands "quicker" and to return to work.

Mr. Jaramillo said that "in general we were always called 'fucking guys'" by Mr. Palmer and, on 2, 3 or 5 occasions, "fucking Spanish". Asked whether Mr. Palmer said "fucking Spanish" to or about someone, Mr. Jaramillo said that he said it directly to him and to his brother. In a telephone interview with the Commission on July 26, 1993, he reportedly described Mr. Palmer's verbal abuse as follows:

...Yes Brian insults people regarding their place of origin. He would say "Fuck you.....he insults.

He confirmed that "fucking Spanish" was an example of this kind of insult. He said that the atmosphere was tense and people were anxious, afraid to speak, "always thinking" and not able to "work in peace".

Asked why he did not complain, Mr. Jaramillo said that Mr. Figueroa had told the workers that "it was a strict order of Mr. Brian that you couldn't speak with either Mr. George or Judy." From this excerpt from Mr. Jaramillo's testimony, it can be seen that Mr. Figueroa played a role, at least insofar as those speaking Spanish, in the "fright that one felt" from Mr. Palmer:

[Mr. Figueroa] brought bad news. He always said that this is what is going to happen to you if you don't work properly, you are going to be sent home. He

carried around the paper and he would look and then he would take notes, like saying, "I am taking your name. Next time you may have to go."

Mr. Jaramillo interpreted this action as something Mr. Figueroa was ordered to say by Mr. Palmer.

v) Vicente Jaramillo

Born in Ecuador, Mr. Jaramillo, now 26, taught electricity in a school prior to his arrival in Canada and at Coldmatic in June, 1991. Mr. Jaramillo is still with Coldmatic and stated his discomfort in giving testimony. He feared being fired, given conversations in the workplace with Mr. Figueroa about the proceedings, which suggested to him that anyone getting involved in supporting the complaint would be fired.

Mr. Jaramillo arrived at Coldmatic after Mr. Espinoza had left. However, his testimony regarding the atmosphere was not substantially different from that described by other witnesses as existing in 1987-89. He described Mr. Palmer's role as follows:

All the time Brian Palmer treats you as if you were less. There was a time when I needed to go back to my country, I asked for permission. I wanted to go to my country for three weeks because I needed to get married; I was going to get married. Then I asked Mario Figueroa if he could serve as my translator. What Mario Figueroa told me was that I was not allowed to go; they didn't give me permission.

First he told me that there was no permission for me. And then he told me two days later that I could go to my country, but when I came back I would start as if I was a new employee. I believe the reason why he wanted to do this is because if I left at the end of December - generally we take about a month to go back to my country - he probably did it because if I was taken as a new person my holidays wouldn't be paid. And I believe this comes from Brian Palmer.

It always happens. For instance, if there is a holiday on Monday, on Fridays we have to be careful to hide and not to show that we are doing something wrong because they would tell you, "Just punch your card and come back on Wednesday to work." That's retaliation that they usually take around holidays.

Q. Do they do this to the Hispanic workers?

A. Yes.

Q. Okay, [question 6 of the interview with the OHRC] I will read it to you. You said: "Takes advantage of those who don't speak English." How does he do that?

A. He abuses because we don't speak English in the sense that when he wants us to do something and we don't understand, he calls us stupid. "You are stupid." "Fucker, you are stupid." All the time when we are working. In my case, when I have done something wrong, and then he says, "Look. Look what you have done. Is that why you want a raise? Is that why you want money? You want more money? You are stupid. Look what you have done." And that makes us feel hurt because he shouldn't act that way. He should tell us what we did wrong simply.

And I think all that he takes note of because when we do something wrong he goes to the office and writes something. And when we go there to ask for a raise he says, "Do you remember when you did this? Do you remember when you did that? And you still want a raise?" That is why there is an air where you feel that they say to you, "You always do something wrong. You have to be down there. You always have to be down there."

While he understood he should be corrected if he made a mistake, it was the way it was done that concerned him. Where Mr. Ramirez would explain and say "Try to do it properly next time.", Mr. Figueroa would say "I am going to tell Brian". Mr. Jaramillo gave expression to the effect of Mr. Palmer's approach when he was asked if insulting people was a good way of improving job performance:

Absolutely not. No, because the more they insult you, you are going down the hole. It isn't necessary for anybody to insult. The air is very heavy there. The foreman, Mario Figueroa, comes and insults everybody and that's --- Always it happens like that. He always is insulting the people. And he always comes to scare the people saying, "Look, yesterday they laid off this person, yesterday they cancelled so many jobs." And there is no need for them to be scaring us like that.

If there is no work the owner will know and then they will probably ask us to go home. If there is no work, the owner can tell us, well, you and you and you go home. But he doesn't have to be kicking us in the back because that makes our people feel bad.

Mr. Jaramillo also confirmed the existence of two different groups - one for those who spoke English and one for those who did not. He elaborated on this in the following exchange with Commission counsel:

Q. In your statement at question number 6, you say: "He is different with Canadians, but with immigrants Brian is sarcastic." Now, what immigrants are you referring to?

A. We are immigrants, right? They could be from any country. But, basically, I refer to the Spanish speakers. So he has two groups in the company, the ones who speak English and the ones that -- we don't speak English. And that's the way he operates, because I cannot speak English I cannot belong to his group.

Those in "Mr. Palmer's group", perceived as favourites, had better treatment and better pay, he said. Asked by respondents' counsel if Mr. Palmer needed a "good course in public relations", Mr. Jaramillo replied: "not public relations, human relations".

Mr. Jaramillo spoke of a number of incidents which occurred after 1989, involving pay levels, raises, punch cards, etc. He said that he was told by Mr. Figueroa that workers could only ask "three times in [their] lives" to see the cards to be sure they were paid for hours worked. In other words, if they were told they had not punched the card, as an explanation for not being paid, workers were "only allowed three times for those cards to see whether we have punched or we haven't punched." He was told that he forgot to punch his card one Wednesday morning before a statutory holiday, as a reason for not being paid for the holiday. He asked to see his card even though, he understood that it would mean he had only "two more opportunities to ever ask for my cards." He never saw the card, he said, but was paid after telling Coldmatic he would go to the Ministry of Labour.

Mr. Jaramillo said that if persons were talking or whistling while doing their work, they were told to stop by Mr. Palmer. He recalled Mr. Palmer coming up to him

in the washroom and asking why he had been so long in the washroom and when told there was a line-up, Mr. Palmer swore at him.

Mr. Jaramillo said that while he complained about both Mr. Palmer and Mr. Figueroa to Mr. Ramirez, nothing was done, in his opinion, because "nobody pays attention to what Carlos Ramirez says". He did not complain to Mr. Palmer or Mr. Zafir regarding Mr. Figueroa, he said, as he doubted they would listen.

The atmosphere described above by Mr. Jaramillo of his experience at Coldmatic after 1991 gives articulate voice to the feelings expressed in the testimony by witnesses who were at Coldmatic in the period 1987-89 and I accept it as a fair reflection of that period.

vi) Elman Castillo, Hugo Videla

Elman Castillo, born in Ecuador, came to Canada in or about 1984 and started at Coldmatic three months later. In 1987, he left Coldmatic over the locker incident, returning later and then quitting finally in early 1989. In his statement and testimony, Mr. Castillo, a good friend of Mr. Espinoza's, said that he left because there was "too_much trouble" and too many problems with Mr. Palmer and with Mr. Belisle. He described the trouble as "treating people badly", swearing and insulting people "for no reason", i.e. he and others were told that Hispanics were stupid and did not understand anything. In his statement to the Commission in 1993, Mr. Castillo described the working atmosphere as follows:

A lot of headaches, I don't know sometimes people were mad because that guy didn't pay all the hours properly.

Hugo Videla, 32, born in Argentina, came to Canada and Coldmatic in or about September, 1988, knowing very little English. He heard about the company from a roommate and went there. He spoke with Humberto Mustica, was told what they would pay, and began to work. Initially paid \$6 an hour, when he got his

immigration papers, he was paid \$7, but with statutory deductions now that he was legal, he ended up with less money than before. He complained about this to Mr. Palmer and Mr. Zafir and the "next Friday I was told there was no more work". He said he was fired but did not know why. He said at the hearing he "was lucky to leave there because there was a lot more work out there". He is now self-employed as a carpenter.

vii) Sandro Santiana, Wilson Canivillo, Humberto Mustica, Vinicio Jaramillo

Sandro Santiana, 32, was born in Ecuador and came to Canada and Coldmatic in 1988. He is still working there and describes it as a "normal factory". He said the Spanish, Chinese and Indian workers were mostly grouped together by language, he thought. The groups got along "pretty well", in his view.

While Mr. Zafir treated him personally very well, he had "a little bit bad temper". He said that he would yell at anybody, saying "What the fuck are you doing!", "Why don't you go to school", and refer to someone not present as a "bastard". He said that he was personally yelled at by Mr. Zafir only once. While doing so, Mr. Zafir asked him if knew what the word "negligent" meant. Mr. Santiana said that he felt that his intelligence was being insulted since the word was practically the same in Spanish. Mr. Palmer kept to himself and had nothing to say, according to Mr Santiana.

Mr. Santiana had studied architecture for 4 years and fine arts for 2 years before coming to Canada. He said that he was not the only one with university education among the Spanish-speaking immigrants, 80% of whom were from Ecuador. He denied hearing "fucking Spanish" used in the workplace but acknowledged that "fucking guy" was "made normal there by using it a lot". He said that he has not taken a vacation since 1988 and has had lots of overtime. He is still waiting for immigration status.

Wilson Canivilo, 35, was born in Chile and arrived in Canada in 1979. He was a welder and began a contractual relationship with Coldmatic at the end of 1989. His time there was sporadic and spent in a building other than the plant in question. When he was interviewed by the OHRC investigator in 1993, he was asked at that time if he was aware of verbal abuse by Mr. Palmer toward Spanish speaking employees and reportedly said:

...When Brian came to work, he was young, Brian was taught by George, he could be nice but then he could turn around and send you home. The poor spanish people can't speak English and Brian laughs at them.

Asked to describe the working atmosphere at Coldmatic, he reportedly said:

There's verbal abuse everyday, for example if a machine is broken it's our fault and even after they find out that they made a mistake they don't apologize. It's discrimination because the way Brian treats the people who don't speak English. Originally I left because of the swearing and treatment. The owner was calling me at night time and begging me to work. He promised me the world but then he changed. The owner is really smart, he makes you feel like a king but then when you get there he treats you differently. I think George treats everybody the same. He promises things but doesn't come through. There are spanish people there who are scared of him when they see George. For example there was a young guy who was Jewish who started working, his name was also George. He worked one Saturday morning starting at 8:00am George gave him such hell from 8 - 12. He made the guy cry. George said to the guy I'm like that at first and then I'm nice. There are people who have been there for 5 years and they are earning only 7.50/hr. almost 75% of the people are. If you ask for a raise then they ask you to leave. ...

At the hearing he did not deny any of the above, but refused to elaborate saying:

"I said it but I don't know what I meant when I said it".

Humberto Mustica, 45, was born in Argentina. He had training but not certification as a chartered accountant in Argentina, where he specialized in bankruptcies. He arrived in Canada in 1982 and replied to an advertisement for a bookkeeper and joined Coldmatic in July 1984. He is now paid \$72,000 and has overseen the company's growth from a family operation at Chesswood to a bi-weekly payroll of over \$200,000. He never worked in the plant and other than

seeing people at the coffee truck, he said that he has no contact with the plant workers, except for paycheque problems.

Vinicio Jaramillo, 30, was born in Ecuador and came to Canada and Coldmatic in August, 1988. He studied medicine for 2 years at university in Ecuador. He had some English when he arrived and has studied it for 2 years here. He said that there were no problems at Coldmatic for anyone who was a "hard worker". He began at Coldmatic under someone else's name and identity and his status has not been finally determined by immigration. He was a deliberately uncooperative witness and had to be reminded on a number of occasions that he was under oath and required to answer. His testimony is discussed elsewhere regarding specific events.

viii) **Kofi Bonsu, Lance Bailey, Paul Belisle**

Kofi Bonsu, 37, born in Ghana, came to Canada in 1987 and to Coldmatic in 1988. His first language was Twi but he was fluent in English. He learned of the company through a friend working there and was hired by Mr. Palmer immediately. Mr. Bonsu reported having no problems and said that he was personally treated very well by Mr. Palmer and never saw him treat others harshly. He said that he never heard either Mr. Palmer or Mr. Zafir say "fuck". This witness was clearly uncomfortable testifying against his employer, and said so.

Lance Bailey, 35, was born in England, and came to Canada in 1978 and to Coldmatic, through Manpower, in 1980. In the OHRC interview in 1993 he described the atmosphere as follows:

It's stressful environment. People aren't happy. I'm not happy. Sometimes it does bother me, why are these guys here and not others, we had a couple of guys loading, a filipino and he said it's racial discrimination because black, filipino and spanish all load. The guys are not too swift, I get treated the way I want to be treated.

He went on to say in this interview that “George is not a bad man, but he pushes his weight around with who he knows” and “Brian takes advantage”; however, the “target is with everybody” and “racist comments are thrown at everyone”. At the hearing he confirmed this, adding that he would speak his mind when being yelled at by Mr. Palmer or Mr. Zafir. He also said that you have to “kiss ass” and confirmed that Mr. Zafir’s temper can “get rough”, that he would “flare and tell you what he wants, how he wants it, and if you can’t do it, the door’s there”.

Mr. Bailey appeared uncomfortable in giving his testimony, showing his resignation with a shrug, and sighing “It’s a job.” He was called “negrito” by some Spanish-speakers and “bro” by Mr. Palmer, he said, but while some might take offence, he did not.

Paul Belisle, 35, was born in Quebec and grew up speaking French and English equally. He came to Coldmatic in 1981 and acquired some Spanish from the plant floor, but said it was mostly profanities.

Mr. Belisle said that the different linguistic groups at Coldmatic get along fine because everyone is there to work. He described Mr. Zafir as a good boss who had brought the company from nothing to what it is now. He said that Mr. Zafir makes some people nervous but said that this is because he is the owner and cares so much about a “good product and clean environment”. Mr. Belisle said it was “almost comical” how some people would make a mistake just after hearing Mr. Zafir yell “What the fuck” about someone else’s mistake. He said that mostly these were people who did not speak English and so did not understand what he was saying.

Mr. Belisle described Mr. Palmer as an “all round good guy who maybe works too much” and would “mess up papers on his desk to blow off steam”. Other than “descriptive swear words such as cocksucker”, Mr. Belisle could not recall any comments in the workplace that he would call racist in nature.

ix) Mario Figueroa

Mr. Figueroa, 34, was born in Guatemala and came to Canada in July 1985. He had some accounting training but worked only in factories here, first in Montreal and then in Toronto. He joined Coldmatic in July 1987. He lived with Carlos Ramirez at the time and walked out when Mr. Ramirez and others did a few weeks after starting work. He came back in October 1987, having been offered and given a substantial increase of \$3.00 an hour.

Mr. Figueroa was working on the German line when its foreman/leadhand Seymour Souly did not return after a two week vacation. He said he just took it over and eventually was considered its leadhand/foreman. He said that the dominant language in his work area in 1987-89 was Spanish. No English was required to run the German line, he said, and as proof of this, noted that he became the foreman of it knowing very little English. Since then he has studied, and still studies, English.

Mr. Figueroa is now working directly under Mr. Palmer, in charge of all three production lines - German, Makron, and Canadian/Continuous - and all three foremen report to, and get directions from, him.

Regarding where and how new workers were placed, he said there was a high turnover of workers, and he would put them with workers of:

the same background so they can understand and do the job very good, and fast, because there is a difference to put someone who is speaking English to work with another who is not speak English

Mr. Figueroa said that he never heard either Mr. Palmer or Mr. Zafir use the words "fucking Spanish", but both would call someone a "fucking guy" or "bastard". He said that "fucking guy" and "cocksucker" were the two most popular words at the factory and were considered okay to use as between the workers and by Mr. Palmer and Mr. Zafir to the workers but never vice versa.

Mr. Figueroa described, in cross-examination by Ms. Rubio, how plant workers would make "jokes":

A. Like, let's say the Chinese guys that we are working with, you know, and someone make it wrong they say, "Are you Spanish", just for a joke, you know.

Q. If someone does something wrong?

A. Let's say the Chinese are working and one of them make something wrong.

Q. M'hm.

A. So another one says, "Are you from Guatemala?" But like a joke, no?

Q. Right.

A. This is nothing.

Q. No, I get it. I get it. So, it is like, are you dumb? Is that what that means?

A. Yes, in other words.

Mr. Figueroa emphasized that these statements, which happened every day, were "for fun" and everybody was laughing and it was a way of "trying to lighten things up". These jokes were never done with Mr. Palmer, however.

In an effort to understand how such comments were perceived as humorous in this workplace, I asked Mr. Figueroa if it was an "in-joke":

THE CHAIRPERSON: [An in-joke] is a joke that is in a group that only the group thinks it is funny because of some association.

What you said, and this is totally off topic here, but if you say that someone dropped something and you say that at this workplace they say, "Are you from Guatemala", or "Are you Africano?", or "Are you Chinese?" Another group might say, "Is it cold outside?" and they would think that is funny. I mean, that is what I am trying to understand, how removed it is from the workplace.

THE WITNESS: Well --

THE CHAIRPERSON: Because as someone outside, it is not immediately funny to me, so I am trying to understand what is the funny part of it.

THE WITNESS: The funny part, what I can see is, they tried to, like, forget the joke in that moment, right?

THE CHAIRPERSON: M'hm.

THE WITNESS: And think about something else.

THE CHAIRPERSON: M'hm. Which people do?

THE WITNESS: Like, when someone, like you can hear the rain.

THE CHAIRPERSON: M'hm.

THE WITNESS: You know, and someone ask you, it is raining outside? You know, why they have to ask you? You know it is raining because the sound.

THE CHAIRPERSON: That is the kind of fun -- joke it is?

THE WITNESS: It is a joke.

THE CHAIRPERSON: Stating the obvious?

THE WITNESS: Yes, something obviously, you know. You understand something.

The joke would always begin with the words "Are you from.." and end with either your ancestral country or someone else's.

Mr. Figueroa said that the joke would go from "nice and easy", if said with a smile, to "severe" if said in a serious tone. Mr. Figueroa acknowledged that it would depend on how one was feeling as to whether or not one took such comments as a joke and that sometimes the joke would become "severe" and he would have to intervene to tell the workers to "go easy" to prevent a fight.

(c) Expert Evidence - Dr. Henry

Frances Henry, F.R.S.C., professor of anthropology at York University and consultant in race relations, was called by the OHRC to give evidence regarding the issues raised in the complaint. Dr. Henry stated her professional interests to

be race and ethnic relations and migration and ethnicity, among other things. She has published a number of reports and contributed chapters to books dealing with the integration and work experiences of various ethnic and racial groups in Canada. She was accepted by the Board as an expert qualified in social anthropology, race relations and racial attitudinal bias.

Dr. Henry was given a copy of the complaint together with the respondents' questionnaire in reply by the OHRC. She was also provided with reports of telephone interviews with persons working or having worked at Coldmatic. These reports consisted for the most part of standard questions followed by the interviewee's answers, which were either summarized or in point form. I would call these neither questionnaire nor statement, but documenting aids for the OHRC investigator, Flora Hoffman. Working only from this information, Dr. Henry prepared comments in note form on which she was questioned at length at the commencement of the hearing.

Dr. Henry in her written report noted:

Because of the diversity [of ethnic composition] in the workplace and because managers are not sensitive to employee needs:

- groups based on ethnicity (or race or language) form cliques - others perceive cliques and a "we" "they" dichotomy develops (in addition to the usual 'we' - the workers versus 'they' - the managers)

- employees become anxious, watch each other for rewards and punishments - who gets promotions, raises, who does the boss like, etc and this dynamic is played out in the context of race, culture and ethnicity and the groups based on these issues

- then complaints are likely to arise from one or more anxious employees about race, language or culture, or race

- manager or boss does not know what to do - treats complaint with denial or tries to diffuse it by 'sweeping it under the rug'. Complaining employee may leave or be fired, but issue is not resolved and hardened attitudes towards various language, culture or racial groups may occur

- intergroup conflict arises and may escalate

Her opinion was that a “poisoned work environment” existed at Coldmatic because of the “interplay between ethnic, linguistic and racial tensions” and the “structural conditions in the workplace”. Dr. Henry described her idea of a poisoned work environment in her testimony as:

an environment in which areas that are not relevant to work performance or work ability are nevertheless used to either judge or devalue or denigrate or discriminate against people, such categories being their race or their colour or their ethnicity or their culture or their language or their gender or--

Such an environment was the “shell, within which conflicts based upon ethnicity, race and so on are very likely to occur and be perceived”. She called ethnic, language and racial diversity the “ammunition or tools” of discrimination. Coldmatic had certain negative structural conditions such as rude treatment, low pay, and inadequate grievance procedures but no positive structure. She commented:

Employees of diverse backgrounds are expected to work together but management has not provided a sensitive or supportive environment in which neither intergroup conflicts nor conflicts between workers and management can readily be resolved.

Dr. Henry said that ethnic diversity can be used as a tool to discriminate as follows: instead of saying “We can't get our work done because Joe is slow”, one might say “We can't get our work done because Joe, the Spanish-speaker, doesn't understand what we are doing.” In other words, a worker's origin and language become the reason for a workplace problem.

It was amply evidenced in the subsequent testimony I heard that any frustration in the workplace at Coldmatic was given this twist of adding language and origin to a workplace problem. Mr. Zafir's exasperated “Where did you come from? Are you stupid?” response permeated the workplace to the point that it became the standard explanation for any slip-up as illustrated by the in-joke “Are you Guatemalan (et cetera)?”.

Dr. Henry was asked by respondents' counsel to explain how one distinguishes between "difficulties in communication or in personnel management" and "racially or ethnically motivated actions". She replied:

I think it's very hard to make that distinction. There are, particularly when people from different cultures and different language groupings interact, there are very often misunderstandings based upon culture and language. And sometimes these misunderstandings have very little to do with actual acts of discrimination. But on the other hand, the very act or the very point of the cultural misunderstanding [or] the language misunderstanding may sometimes be the jump off point, as it were, or the motivating factor that will lead to an incident or an event of discrimination.

And what I am referring to, if I can give you an example, when people, say, don't understand each other because of the culture and language barriers and when there is a difference in their status, that is between a superior and a subordinate, the interaction then sometimes can quickly jump to a discriminatory or pejorative statement that one, usually the superior person, says to the subordinate.

So what I am suggesting is that what may begin as a cultural misunderstanding or a language problem, if you will, because of the unequal power relations between the superior and the subordinate, that situation may quickly turn into a derogatory, pejorative, or in fact discriminatory situation.

Asked further how one differentiates, Dr. Henry replied:

I would say that an isolated event or a single event or even two events may not be sufficient to come to that generalization [that there is more than a cultural or language problem] but a series over time, repeated, experienced by different individuals in the same social arena, I think would lend support then that these situations are more than just cultural misunderstandings.

(d) Argument

On behalf of the complainant, Ms. Rubio submitted that the evidence established the existence of a poisoned work environment. She noted that Mr. Espinoza was a member of a minority ethnic group - Ecuadorian - and as a Spanish speaker was linguistically identifiable. Since ethnic origin included the sharing of a common past or language, it did not matter that some Spanish-speakers were from Ecuador and some from other Spanish-speaking countries. She submitted that as such he was subjected to discriminatory treatment, along with other

Spanish-speakers, and indeed lost his job as a result of this poisoned work environment in which Spanish-speakers were devalued.

Ms. Rubio submitted that Mr. Palmer fit the typical profile given by Dr. Henry of one likely to discriminate in a culturally diverse environment - one who was rigid in his view of the world and right and wrong, with little education or knowledge of other cultures. While Mr. Zafir had experienced the holocaust, this did not mean he was always sensitive to others' needs. As Dr. Henry stated, she said, discrimination has a lot to do with power and authority, and Mr. Zafir, whose bottom line was profit, took advantage of those without power because it made economic sense to do so. She submitted that Mr. Zafir did not pay attention to complaints from Spanish-speakers because he did not want problems, he wanted production. This is what Mr. Palmer gave him, she said, at a high human cost. While there were some token Spanish-speakers in supervisory positions, the majority were kept in low level entry jobs.

Ms. Ffolkes-Abrahams argued that a poisoned work environment existed for Mr. Espinoza throughout his employment at Coldmatic from 1987-89. He was subject to differential treatment based on his linguistic and ethnic background as a person who spoke Spanish and little English. He was also subject to differential treatment in the workplace which appeared to have two different rules regarding hiring and workplace rules - one for those with immigration papers and those without. The difference in treatment of workers who spoke English and those who did not was not justified and was based upon a characteristic of an ethnic group in this workplace. She relied on Olarte v. Commodore (1983), 4 C.H.R.R. D/1705 (Ont. Bd. Inq.) as being similar to this case, with sexual harassment replaced here with harassment based on ethnicity or place of origin.

On behalf of the respondents, Mr. Siegel submitted that people who speak Spanish in Canada do not make up an ethnic group, as they include persons from many different countries, just as people who speak English cannot make up

an ethnic group, as they come from various countries. Language is not a prohibited ground under the *Code*, distinct from ethnic origin, and there is nothing to establish that the workplace discriminated specifically against persons from Ecuador, he submitted.

Mr. Siegel emphasized that the occasions in which “fucking Spanish” or “fucking latins” were used were minimal over the years and not enough, using Dr. Henry’s guideline of a series of discriminatory acts, to constitute a poisoned work environment. “Fucking guy” was the most common word used and had no ethnic overtones. Profanity was common to the all-male environment of the factory or shop floor. He submitted that while Mr. Zafir and Mr. Palmer swore profusely they never called anyone names or referred to where they were from.

That a workplace is unpleasant is not enough for a finding to be made under the *Code*. While Coldmatic was “not that happy or loving a place”, and people were told to “go learn English”, it was not “pejorative, but beneficial”. In any event, the issue, he submitted, is not whether Mr. Espinoza was “unfairly treated” when fired or sent home, but whether he was treated differently in a discriminatory way. Real life, he said, has negative outcomes which are not always discriminatory.

FINDINGS

In addition to the specific findings of fact made in the course of reviewing the testimony, I make the following findings.

The complaint alleges discrimination on a number of grounds which are often combined as a kind of wide net to get at certain complex discriminatory conduct: race, colour, ancestry, ethnic origin and place of origin.

Race was defined by Dr. Henry as “a biological concept which refers to the inherited physical and physiological characteristics of a group of people”, the

most common of which are skin colour and hair texture. Colour is therefore a characteristic within a race. Ancestry was defined in Cousens v. Nurses' Association (Canada) (1980), 2 C.H.R.R. D/365 (Ont. Bd. Inq.), to mean "family descent...determined through the lineage of one's parents through their parents". These grounds were not actively pursued in either evidence or submissions.

Other than that Mr. Espinoza was born in Ecuador, no evidence was led with respect to his personal ancestry, race or colour. It is not known whether his ancestry, race or colour stemmed from the indigenous peoples, European colonizers of his country or both. It appears to have been assumed that it was the former.

Ethnic origin and place of origin are not defined in the Code and have not been discussed at length in the case law. In the *Concise Oxford Dictionary*, "ethnic" is defined as "pertaining to race, ethnological" and "ethnology", as the "science of races and their relations to one another and characteristics".

In *Anatomy of Racism: Canadian Dimensions* by Hughes and Kallen (1974), as quoted in Keene, supra, at p. 56, the concept of "ethnicity" is discussed as follows:

The most important criterion underlying the concept of ethnicity is that of common ancestry or peoplehood. Common ancestry, in turn, is a multi-faceted concept implying at least three criteria: biological descent from common ancestors, maintenance of a shared ancestral heritage (culture and social institutions), and attachment to an ancestral territory (homeland). These criteria provide the foundation for the actual or assumed distinctiveness of an ethnic category - a people classified as alike on the basis of ethnicity. The criterion of biological descent from common ancestors underlies actual or assumed physical distinctiveness. When this criterion of ethnicity is emphasized in classification, we may speak of a *racially-defined* ethnic category. The criterion of attachment to an ancestral territory or homeland underlies actual or assumed distinctiveness deriving from national origin. When this criterion of ethnicity is emphasized we may speak of a *nationally-defined* ethnic category. The criterion of maintenance of an ancestral heritage underlies actual or assumed socio-cultural distinctiveness. When this criterion is emphasized we may speak of a *culturally-defined* ethnic category. Frequently, the criterion of ancestral heritage emphasizes one socio-

cultural phenomenon such as language or religion. When the aspect of culture selected for emphasis is language, we may speak of a *linguistically-defined* ethnic category; when it is religion, we may speak of a *religiously-defined* ethnic category.

Although these distinctions are analytically useful, it is important to note that a given ethnic category may be arbitrarily classified on the basis of any one or any combination of these criteria of ethnicity.

As can be seen from the above, all persons have a certain "ethnicity", which may stem from a variety of common denominators, not all of which are immutable or innate. This was confirmed by Dr. Henry in her testimony.

There is also nothing inherent in the above definition which would limit "ethnicity" to minority groups within a larger group in a given society. The common perception of ethnic equating with minority would appear to be a reflection only of the fact that larger ethnic groups might take for granted what smaller groups seek to preserve and define.

Dr. Henry defined "ethnic" and "ethnic origin" as follows:

Ethnic refers to place of origin of a group, that is in geographical terms, the actual place in the world that they come from. It refers also to their cultural patterns and cultural beliefs which are shared amongst them. And with respect to the cultural shared features, the ones that are most important in human populations are such things as a shared language, a shared religion, and other social characteristics such as family organization, kinship, and other aspects like that.

Included also in the definition of ethnic or ethnic group is the individual's own subjective identification as a member of X group. So that there are both objective characteristics of an ethnic group, such as I have described, and there are also subjective features such that an individual identifies as a member of a particular group.

Dr. Henry added that, in the field of "ethnicity", the word ethnic refers to a person's background, including "such factors as place of origin, geographic and cultural, linguistic, religious, and sometimes racial." Regarding Mr. Espinoza, she said:

Well, insofar as Mr. Espinoza is from a specific area of the world, namely Ecuador, within the continent of South America, he comes, therefore from a specific cultural area and a specific country. ...Ecuadorians or South and Central Americans in general are a fairly small component, demographic component, of Canadian society.

Asked whether there was an interplay between his ethnic and linguistic background, she stated:

Yes. I think there is, in this particular case, a very strong connection. Language is often one of the main criteria of ethnicity, and in this case it is the Spanish language. And at issue are alleged events which occurred in the workplace with respect to people who shared a common language, namely Spanish. So that the tie between geographic or cultural background, ethnicity and language, in this case, appears to be particularly strong.

I agree that Mr. Espinoza and those others from Ecuador and other Central and South American countries were identifiable in terms of ethnic origin based on a common language and a common historical colonial past in a specific geographical area. Their ethnicity can be culturally and linguistically defined as "latin-american", with the prominent identifying factor being the Spanish language. The group of "new" immigrants or "new" employees at Coldmatic in 1987-89 were identifiable by their ethnic origin and were treated differently and ridiculed for use of their common Spanish language, and for their inability to speak English consistent with their recent arrival in Canada from their place of origin.

The respondents' position that there cannot be discrimination on the basis of language, because it is not one of the protected grounds, was considered. In my view, language as a protected ground is not the issue. To the extent that language can be incorporated in the protected ground of "ethnic origin" or "place of origin", it can be addressed, not as a sub-category, but as one of many identifying features of "ethnicity".

I find that the workplace at Coldmatic was divided into groups and that Mr. Espinoza was in the group identified as Spanish-speaking new immigrants who spoke little or no English language. There was a structure at Coldmatic which was loyalty-based, not organizationally-based. This created an environment where persons could be treated differentially by those with power with little or no recourse for complaint. Mr. Palmer did not like people who did not speak English and gave full vent to this personal view. Mr. Zafir wanted profits and to the extent that he saw Mr. Espinoza's group as interfering with profits, he treated them with disdain and berated them. Both Mr. Palmer and Mr. Zafir were able to rant in the manner they did because Mr. Espinoza's group, by reason in part of their ethnic origin, was a) captive for economic, legal and political reasons because of their uncertain immigration status; and b) unable to respond or defend themselves because of inability to speak English, the lingua franca of the workplace. "Where are you from... How did you get here...Why don't you speak English" were gratuitous and insulting reminders that they did not belong and somehow were not worthy enough to belong. Accepting that profanity may have been the norm for all workers at the Coldmatic workplace, the use of it went beyond the ubiquitous "fucking guy" to "fucking Spanish" becoming a profanity with ethnic overtones.

The overwhelming impression left by the testimony heard was that no one liked what was going on at this workplace. The only difference was how one coped. The Spanish-speakers who did not cope well with it were described as not good workers, "strictly 8-5", not committed to helping the company or themselves. Mario Figueroa and Vinicio Jaramillo suggested that other Spanish-speakers were "lazy", "just wanted to make money to return to their country", and did not "learn English and get ahead", like they did. In other words, the industry of the powerful justified the powerlessness of the indolent.

The most poignant illustration of how this workplace was affected by discrimination based on ethnic origin was the existence of the in-joke equating ethnic origin with a state of ignorance. While other places of origin may have been used as well, the fact remains that "Are you Spanish", and variations on this theme, became a synonym for "stupid". That it was used on some occasions against oneself was explained as a means of lightening the tension. Making yourself the butt of the joke before someone else can is a well-known coping mechanism for humour which masks hostility.

The Spanish-speakers, especially those with little English, were treated in a bullying and denigrating manner by Mr. Palmer on a regular basis. Mr. Palmer was under a great deal of pressure in this make or break period of 1987-89. He was fast-tracking his way into management from a general labour position. That Mr. Zafir was his mentor is beyond question. However he had, by youth or history, insufficient experience to temper his new-found authority.

I do not accept the respondents' argument that the treatment received by those Spanish-speakers, like Mr. Espinoza, who spoke little English was merely objectionable and not discriminatory nor that it was all that could be expected of an all-male environment. I agree that an unpleasant workplace is not necessarily a poisoned one, in the sense required to make a finding under the *Code*, and I am not oblivious to the fact that work environments will vary in their tolerance for certain otherwise objectionable language or behaviour. However, I am not prepared to conclude, by way of judicial notice, that wherever men gather, profanity and crude or rude behaviour will flourish. It does not do justice to the gender and is far too simplistic to assist in understanding human interaction and behaviour.

The operative dynamic on the plant floor at Coldmatic was power: who had it, who did not. The loyalty was tight. Mr. Zafir referred to Coldmatic as "our compound". The power was wielded by Mr. Palmer, Mr. Zafir, and their

designates and had a discriminatory effect. Mr. Espinoza was part of the sub-class created of Spanish-speakers who did not speak English. Hired without need of English, they were ridiculed for their lack of it. The Respondents' actions created a "them/us" situation far beyond the usual political and social divisions which are common in any workplace.

I do not find it at all surprising that one or more were exempted from the overall treatment of the sub-class created. Divide and rule has long been an effective tool of control and by designating a few, control is facilitated by making it faceless and more efficient. Persons such as Mario Figueroa, and to some extent Carlos Ramirez, infused with some power of their own, become willing and often shameless oppressors of their own group as they do what is necessary to keep that power. I accept that their actions were sanctioned by the respondents implicitly and explicitly.

It must be recognized that there was a subtext to the complaint - the integration of immigrants to Canada into Ontario society in an era of multiculturalism and financial restraint, amid growing tensions as workplaces are restructured for fiscal, corporate or equity driven reasons. What are the obligations of the immigrant and the host society in the "adjustment" period in terms of language and cultural accommodation? Mr. Zafir suggested that the government, and not business, should make sure immigrants are able to speak English. I cannot answer those questions and they are not the issue I have to determine. This decision can at best be cognizant of the fact that this complaint and the response do not take place in a vacuum.

Regarding the specifics of the complaint, the emptying of the lockers by Mr. Zafir, while a domineering act, was less related to the ethnic origin of Mr. Espinoza and others than to his overreaction to the presence of a rat in his brand new building. However, his dismissive response to the protest by the Spanish-speakers was typical of their treatment in this workplace which was

based, in part, on ethnic origin and place of origin. Similarly the forgotten pay raise and the paycheque incidents reflected this treatment. Most of the Spanish-speakers were from Ecuador with a considerable number arriving without papers. I make no comment on the legalities of immigration status as this is for another forum to decide. However, for the purposes of the findings I have to make, I am satisfied that Coldmatic was aware and made full economic use of the legal vulnerability of this group, and in that sense treated them differently based on ethnic and place of origin. The racial and ethnic conflict prevalent for all in this workplace contributed to the altercation which culminated in Mr. Espinoza's dismissal and I am satisfied that a Canadian born worker would not have been treated by Palmer in the way that Mr. Espinoza was on March 2, 1989.

ORDER

This Board of Inquiry having found the Respondents to be in breach of sections 5(1) and 9 of the *Code* in the complaint of Luis Espinoza, it is ordered that:

1. The Respondents are jointly and severally liable to pay to Mr. Espinoza:
 - (a) as damages for lost wages, the sum of \$6,000 for his 13 1/2 weeks without employment after his dismissal on March 2, 1989, plus pre- and post-judgment interest in accordance with the *Courts of Justice Act*,
 - (b) as general damages, the sum of \$2,000, reflecting the mental anguish caused by the wilful and reckless infringement of his right to equal treatment.
2. The Respondents shall cease forthwith in the discrimination of workers at Coldmatic based on race, colour, ancestry, ethnic origin or place of origin.
3. The Respondents shall retain the services of a human rights consultant, with expertise in creating effective procedures in a culturally, racially, and

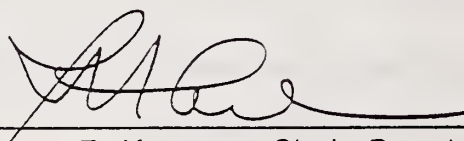
linguistically diverse workplace. The Respondents shall, with the assistance of this consultant, create grievance procedures and training for those in the workplace, dealing specifically with the complexities, challenges and rewards of sharing a culturally and ethnically diverse workplace. The Respondents shall provide evidence of the grievance procedure structure in place, and of a training plan, acceptable to the OHRC, within six months of this decision.

4. The Respondents are to display in a prominent place in the workplace: this order; the OHRC policy on harassment; and the *Code*. The Respondents shall ensure these documents are duly translated into the main language groups of the workplace and displayed in the same manner as the English versions.

5. The Respondents shall ensure that this order is publicized in the workplace in the same manner as a health and safety report.

6. The Respondents shall refrain from any reprisal of workers who testified for or against the complaint. The Respondents shall advise the OHRC of all persons leaving Coldmatic, voluntarily or otherwise, for one year following the date of this decision.

Dated at Toronto this 31st day of March, 1995.

A handwritten signature in black ink, appearing to read 'R. Hartman', written over a horizontal line.

R. Hartman, Chair, Board of Inquiry